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New Jersey Court of Errors and Appeals

ERNEST C. HINCK,
Appellant,

vs.

MILTON L. COHN,
Defendant-Appellee.

Brief for Appellant.

Facts.

Appellant, plaintiff below, appeals from a final judgment entered against him, upon the pleadings dismissing the complaint with costs (State of Case, p. 11, l. 30, *et seq.*). The judgment was rendered on the pleadings and facts stated to the court below, which facts are before this court on a stipulation (S. of C., p. 13), and which are to be considered a part of the whole pleadings and the facts upon which the case is to be decided in this court. The plaintiff's suit was on a lease in writing wherein he is the landlord and the defendant is tenant, for rent coming due thereunder on September 1st, 1913, in the sum of $91.67 (S. of C., p. 5, ll. 10, 11 and 12). To this claim for rent the defendant answers that on September 2, 1913, he paid this rent under this lease to one, Athenia T. Simpson, "the owner of the reversion of the said demised premises" (S. of C., p. 9, ll. 1 to 5). The only ownership of the demised premises on September 2, 1913, had by Athenia T. Simpson, was such ownership as results from an agreement of sale and purchase entered into between her and the sheriff of the County of Essex on August 26th, 1913, a true copy

of which is shown in State of Case, p. 13, said sale being made by the sheriff on a *fieri facias* issued on the usual final decree on a foreclosure suit of a mortgage covering the demised premises made prior to the lease, wherein Athenia T. Simpson was complainant and the appellant and his wife were the sole defendants (S. of C., p. 8, l. 25, and p. 13, ll. 12 to 22 inclusive). By the terms of sale, Simpson, the purchaser, was not entitled to a deed till September 23rd, 1913, and did not in fact receive the deed till September 25th, 1913. Other facts, if any, required for the decision will be stated in the following:

I.

RENT ACCRUING BETWEEN THE DATE OF SALE AND DELIVERY OF DEED BY THE SHERIFF UNDER A FORECLOSURE BELONGS TO THE OWNER OF THE EQUITY OF REDEMPTION.

The appellant was the owner of the equity of redemption. The rent accrued in his favor on September 1st, 1913, before the delivery of the deed of the sheriff to the purchaser (which occurred on September 25th, 1913), and the earliest date on which the purchaser was entitled to her deed was September 13th, 1913. The only title to the reversion had by Athenia T. Simpson, on September 2, 1913, was such title as the contract of sale between herself and the sheriff gave to her.

The statement made in the heading hereof is well nigh universal—that rent accruing on premises under foreclosure between the date of sale and date of delivery of deed belongs to the owner of the equity of redemption:

Jones on mortgages (6th Ed.), p. 613, vol. II, par. 1659:

"The rents accruing between the day of sale "and the delivery of the deed belong to the own- "er of the equity of redemption and not to the "purchaser, as they go with the possession, or the "right of possession; and generally the purchas- "er is not entitled to the possession, or to the "rents, until he has made a demand for posses- "sion under his deed."

Cyc. Vol. 27. Title Mortgages, p. 1730, subtitle Rents and Profits.

"A purchaser at a foreclosure sale is not en- "titled to any rents or profits of the estate due "up to the time of the foreclosure, or occuring "during the pending of the foreclosure proceed- "ings, or between the time of the decree and the "sale, unless, being the mortgagee himself, he has "caused the sequestration of such accruing rents "by procuring the appointment of a receiver. But "such purchaser is entitled to the rents, issues "and profits of the property from and after the "time when he becomes invested with the title "and the right of possession, which may be from "the time of confirmation of the sale by the court, "the expiration of the period allowed for the re- "demption after sale, or the delivery to him of a "sheriff's or master's deed. But the foreclosure "sale and deed do not ordinarily establish the "relation of landlord and tenant between the fore- "closure purchaser and a third person who is in "possession under a lease from the mortgage. In "order to have the remedies of a landlord against "such a person, the purchaser must exhibit to him "the official deed under which he claims, or take "his atornment or give him a notice to quit, or "otherwise demand and receive recognition of his "right as owner of the premises."

In New York the same rule prevails. In the case of *Cheney* vs. *Woodruff*, 45 New York, page 98, the

Court of Appeals of that State considered the same question and held that the owner of the equity of redemption was entitled to rents accruing before the delivery of the deed.

"The sole question here is, has the purchaser "at a mortgage foreclosure sale, after he gets "his deed, a right to the rent accruing between "the time of purchase and the time of delivering "the deed?

"It is insisted by the plaintiff's counsel, that "all interest in the land is gone from the mort- "gagor at the instant of the auction sale, though "the deed is not to be given, nor the money paid "in full till some time thereafter; and that al- "though the purchaser does not thereby acquire "the legal, he does the equitable title, which is "perfected by the delivery of the deed; and that "the deed, when given extends back by relation "to the time when the premises were bid off."

"But what right had the plaintiff to this rent? "He had not possession of the premises until "after this term had expired, nor had he any right "to such possession. He had not paid all the pur- "chase money. He had no deed; until he received "that, he had no title under a mortgage foreclos- "ure so as to claim any rent, and his claim, when "he did receive the deed was prospective."

"As to the right to rent, it is of no moment "whether the money had been paid or not, or "whether the purchase money was or was not upon "interest. Such equities are all settled by the "bidding, by the terms of sale; and the bids are "regulated accordingly. Whether the money is all "paid at the time of the bid, or chiefly when the "deed is to be delivered, or whether the rents shall "be received from the day of sale or the day of "the deed's delivery, is of no moment as to the "equities of the parties. These things all regulate

"the bidding, where the principles governing "them are understood."

"The cases cited establish that this doctrine of "relation is a fiction for promoting justice; and "though its application to this case is not recog- "nized, I see no objection to its allowing a pur- "chaser, after he receives his deed, to maintain "an action for any injury to the premises inflicted "after his purchase. It might, for that purpose "be placed upon the rule in equity that what is "agreed to be done is, in equity, regarded as al- "ready performed."

In Mass. the same rule is well established, see *Haven* vs. *Adams,* 8 Allen, 364, at page 365, where the Court said:

"But the Court are of the opinion that this posi- "tion cannot be maintained. Until the demand- "ants were put in possession under their writ of "*habere facias* the mortgagors and the tenant "claiming under them were entitled to the rents "and profits."

The same rule prevails in all the other states that have the regular procedure for foreclosing mortgages known to this State. See cases cited in *Jones on Mortgages and Cyc, supra.*

The same rule prevails in New Jersey, in the Court of Chancery.

See the list of cases cited in *Cropper* vs. *Brown,* 76 N. J. Eq., 413, and especially *Thompson* vs. *Ramsey,* 72 N. J. Eq., page 457, and the remarks of Vice-Chancellor Garrison, on this subject, at page 419.

The Circuit Court Judge (Hon. Frederic Adams) on deciding this case said that there were two opposing line of cases in New Jersey, both of which were recognized as good law by the Court of Errors and Appeals, that one class sustained the plaintiff, and the other class the defendant, and that he was unable to determine which class of cases this Court would

ultimately apply as to rent accruing between the date of sale and delivery of deed.

Judge Adams evidently referred to the division of cases mentioned and collected by Vice-Chancellor Garrison in *Cropper* vs. *Brown* (*supra*). If we consider as law the first class of cases of which *Den* vs. *Stellman,* 10 N. J. L., is a sample, holding that the substantial part of a judicial sale is the delivery of the deed, then the judgment *sub judice* is obviously erroneous, and the plaintiff should have judgment.

And if we consider as law the second class of cases mentioned in *Cropper* vs. *Brown, supra,* holding that the substantial thing in a judicial sale is the contract made at the time of sale between the officer and the purchaser, we will reach (as to accruing rent) exactly the same conclusion, that the rent belonged to the owner of the equity of redemption. The doctrine of relation back is founded upon the theory (and this theory is the one stated in the Compiled Statutes Vol. IV, page 4675, sec. 7), that the sheriff is the agent created by law to sell for the judgment debtor or the owner of the equity of redemption their rights in the property, and that the contract of the sheriff with the purchaser is the same as if made by a private person, without the intervention of the officer. All the rules of law that attach to such a contract as between private persons, are held to appertain to the contract between the sheriff and the purchaser from the sheriff. The rules in relation to private contracts are well and universally established. In equity the vendor ceases to be the owner of the property, and becomes a trustee for the vendee and the vendee becomes the owner for substantially all purposes. The trusteeship of the vendor is not absolute, however. He has a beneficial interest by way of vendor's lien *and he has the right to take for his own use the rents and profits up to the time of completion of the contract,* that is the time

fixed in the contract for taking over the title to the premises.

Paine vs. *Meller,* 6 Ves., 349, 352.
Wall vs. *Bright,* 1 J. & W., 494, 500.
Shaw vs. *Foster,* L. R. 5, H. L., 321.
Lysaght vs. *Edwards,* 2 Ch. D., 499, 525, 528.
Re Cay Elires Contract, 2 Ch., 143.
King vs. *Ruckman,* 24 N. J. Eq., page 298, at page 301.
Cyc. Vol. 39, page 1628, Sec. 9, sub-title, rents and profits.

Unlike the case of goods, the legal title in land can never pass by the contract itself, a conveyance distinct from the contract is required. Hence the relation back of the legal conveyance by the sheriff must refer back to those equitable rights embraced in the contract *and no other.* The sheriff's deed must be a translation of the equitable rights, created by such contract of sale, into such form that they will be available at law, and no other rights than those thus created by the contract of sale. It cannot be held in the same breath, that the deed, if in and of itself nothing but a ministerial act, conveys more *legal rights* than the contract between the sheriff and the purchaser created in equity in respect to the land. In equity such a contract does not convey rent, nor create any right to rent accruing before the time of the delivery of the deed as called for in the contract itself. Since the sheriff's sale is the ordinary contract wherein the sheriff is substituted by law for the seller, and the purchaser is the ordinary vendee, it must likewise be held that all the rights and all the liabilities that flow from such relationship, attach to such contract, and one of such rights is that the vendor is entitled to all rent accruing prior to the time fixed for the delivery of the deed according to such contract.

Whatever confusion is supposed to exist between the two classes of cases in New Jersey as to the effect of

a sheriff's deed seems to be due wholly to the confusion arising from not distinguishing between a legal right and an equitable right. The deed of a sheriff when delivered relates back and takes in all rights of the unwilling vendor, which are equitable rights, recognized as appertaining to the land and being a part of the realty, and such as pertain to the realty by virtue of equitable ownership; but any right in the land arising from and based upon *legal ownership and possession,* or any fruits or avails of land which have ceased to be a part of the realty (such as rent accrued being mere personality), are not included in the equitable rights acquired by virtue of a contract between vendor and vendee and hence the deed given to convy such equitable right in form of law does not convey such right (be it rent or other incident of legal ownership). A right incident to the legal ownership of land does not relate back by reason of an after-delivered deed; the relation back of a deed to the time of purchase takes in just what a *cestuique*-trust is entitled to as against a trustee. The vendor is the trustee. The vendee is entitled to all increase of values of land, must bear all losses, tempests, flood, fire or fall in prices, has the advantage of all additions or improvements which happen to the land after the date of the contract and if the vendor makes any improvement they become the property of the vendee without further payment.

(*Clare Hall* vs. *Harding,* 6 Hare, 273, 296; *Monra* vs. *Taylor,* 8 Hare, 51, 60.)

The vendor, if the land be let, is entitled to receive the rents as they become payable.

Loomis vs. *Shriner,* 145 S. W., p. 865.

Woods Landlord and Tenant, 2 Gd. Sec., 455.

Rent is an incident of possession or right to possession in law. A purchaser on a foreclosure sale is not entitled to possession until a deed has been delivered to him. No rent can appertain to the equitable rights

which the vendee has in the land under a contract of purchase, such equitable rights are in respect to the land as land, not to the incidents growing out of the possession, use and occupation of land, to none of which an equitable owner, who by his own act has put off the time of possession, is entitled. Rent is an incident to the legal ownership of the reversion; it cannot be an incident to an equitable right to have the reversion conveyed to the vendee, at some future time. The purchaser herself agreed, in this case, not to have the possession of the land until after the accrual of the rent in question, and accordingly her deed from the sheriff in relating back to the time of sale conferred upon her no other rights than those which were embraced in her contract as vendee with the sheriff. Such distinction clearly eliminates all alleged discrepancies between the two class of cases.

In *Condon* vs. *Marley*, 51 Pac., 924, it was contended by a purchaser at a foreclosure sale that his deed related back to the time of sale and took in all rent accruing from that time to delivery of deed by the sheriff, and the court admitted that by the terms of the Kansas statute the deed did relate back, but that such relation back in no way applied to rent.

> "The doctrine that the confirmation of the sale "of real estate relates back to the date thereof, "and that the title passes at the date of the sale, "if it be subsequently confirmed, seems to be a "necessary deduction from the language of our "statute. Under that statute the purchaser's title "is derived from a valid execution sale; his right "of possession from the confirmation thereof, fol- "lowed by the issuance of a deed. Those appear "to be the purchaser's several rights; after a "valid sale, the right to a sheriff's deed; after "receiving the deed, the right to possession of the "premises. If the latter right be denied, a writ "of assistance will be allowed, to put him in pos-

"session. His right to possession extends to the "whole title of the mortgagor, and to the whole of "the realty as it was at the date of sale. It fol- "lows that he would thus be entitled to the crops "which were growing at the date of sale, notwith- "standing they may be matured by the time the "sale is confirmed, and the deed issued. But "money rent for the use of the property in the "case before us is not in any way similar to grow- "ing crops. The latter are a part of the realty, "the former only a possible incident to the use "of premises. Here it appears that the defend- "ant was in possession, whether in person or by "tenant is immaterial. If in person, no rent was "being paid. Could it be contended that the right "of possession on the part of the purchaser, which "was clear after all the proper steps had been "taken, was sufficiently clear before they were "taken, that he was entitled to collect rent from "the mortgagor in possession from and after the "date of the sale? No Kansas statute or decision "warrants an affirmative answer." The decision quotes the following from Wiltsie, Mortgage Foreclosure, sec. 588. "Upon a mortgage fore- "closure sale the purchaser does not acquire the "title to the premises, nor a right to the posses- "sion thereof, until the delivery of the deed by the "officer making the sale. Until that time the own- "er of the equity of redemption will be entitled "to the possession of the land, and to its rents "and profits and * * * where the rent becomes due "and payable between the day of sale and the "time when the purchaser becomes entitled to "the possession, it belongs, to the owner of the "equity of redemption and not to purchaser at the "sale."

II.

JUDGMENT SHOULD BE RENDERED FOR THE APPELLANT AND AGAINST THE APPELLEE WITH COSTS IN BOTH COURTS.

This court has before it all the facts in the case and nothing further can be elucidated by a trial. By virtue of the new Practice Act, judgment can be given at once.

Respectfully submitted,

ROBERT M. BOYD, JR.,

Attorney for and of Counsel with the Appellant.

The Baker Printing Co., Law Case Printers, 251 Market St., Newark, N. J.

New Jersey Court of Errors and Appeals

ERNEST C. HINCK,
Complainant-Appellant,
vs.
MILTON L. COHN,
Defendant-Appellee.

On Contract.
On Appeal from Essex County Surrogate Court.

Appellee's Brief.

The appellant, being the owner of the equity of redemption in certain premises in Montclair leased to the appellee, ceased the payment of interest, and the mortgagee, one Athenia T. Simpson, filed her bill to foreclose the mortgage resulting in a decree of foreclosure in the ordinary form on the twenty-seventh day of June, 1913, followed by the issuance of a *fi. fa.* and sale by the sheriff of Essex County on the twenty-sixth of August, 1913, at which sale the property was struck off to the complainant and mortgagee, said Athenia T. Simpson. This sale was confirmed on the sixth of September, 1913, and the sheriff's deed followed on or about the twenty-fifth of the same month. September rent under the lease in evidence, amounting to $91.67, fell due on the first of September, 1913. The purchaser at the sheriff's sale, Athenia T. Simpson, having notified the tenant of her rights in the property, the latter paid her that amount, as rent for September. On the eighteenth of that month the appellant caused a summons to be served on the tenant for that rent. The case went to trial under a stipulation that the declaration and the pleadings were to be taken as true, from which the above facts all clearly appear.

By a stipulation there is now injected into the case the conditions of sale signed by the purchaser of the property. If any new facts thus introduced have any bearing upon the question at issue, we conceive that the court has no jurisdiction to consider them. The only case which this court can consider is the one which appeared before the court below. We believe, however, that the only fact embodied in these terms of sale, which has any effect upon the question is a matter of common knowledge, or is a mere statement of law of which the court takes judicial notice, namely: that the deed was not deliverable until after the confirmation of the sale by the Court of Chancery and the balance of the purchase price not payable until that date.

But it is in evidence that this sale was confirmed on the sixth of September and the presumption in the absence of evidence to the contrary is that the purchase money was the mortgage itself, and had been paid long before the sale. The purchaser became entitled to her deed on the thirteenth of September (not the twenty-third as is erroneously stated in one place in appellant's brief), but for some reason the actual delivery was not made until the twenty-fifth.

First.

The appellant had no title to or right to possession of the demised property on September first, 1913, *which would entitled him to the rent payable in advance on that date.*

Except for a possible dictum or two, the right to the rents and profits of property sold under foreclosure, as between the former owner of the equity and the purchaser between the time of sale and the confirmation thereof by the Court of Chancery, or between the time of sale and the giving of the deed, has not been passed upon in this state. The statutory conditions, and even the common law pertaining to

mortgages and their foreclosure in other states, differ from those in New Jersey, and precedents cited by the appellant from other states are not applicable. For instance, in *Cheney* vs. *Woodruff*, cited by appellant (45 N. Y., 98), the purchaser was not the mortgagee. The statute covering such sales in that state is not cited, and no decision which defines the status or rights of a mortgagee who has bid in the property at a foreclosure sale is shown. But it is well settled that in some jurisdictions, when the *mortgagee* purchases at a sale of the premises under a decree of court, no deed from the trustee appointed to make the sale is requisite to invest him with the legal title. The sale merely confirms and makes absolute the title he already has by his mortgage, and "without a deed from the trustee he can maintain ejectment from the property." This is all set forth in Jones on Mortgages in the paragraph subsequent to the one cited by the learned counsel on the second page of appellant's brief.

The precise question here is this: Can the former owner of the equity in mortgaged property which is under a lease, recover from the tenant the advance rent which falls due on a day *subsequent* to the purchase of the demised property by the mortgagee in foreclosure proceedings instituted by her, the tenant having attorned to the purchaser, and the suit the recover the rent not being begun until after the sale to the purchaser has been confirmed, and the purchaser has either received a deed or become entitled to it under the terms of the sale? The task is to ascertain whether an answer to this question can be found in accordance with legal and equitable principles established by the course of judicial decisions in this state.

To clear the way it should be pointed out that this question is not answered by the rule which prevails in the case of voluntary contracts. It is almost uni-

versal in such contracts to settle the question of rents and profits by the terms of the writing itself. There is nothing in the contract created by the bidding in of the property and signing the terms of sale which does that. If in the case of private contract this question is not settled, the right to intervening rents would be determined by the existence or non-existence of a variety of facts and circumstances in each particular case, and no general rule is possible. This is made perfectly manifest by the section from Cyc. cited by counsel, namely: Vol. 39, page 1628, section 9, subtitle "rents and profits."

Nor does it help us in the least to say that the rent "belongs to the owner of the equity of redemption or that "rent is an incident to the legal ownership of the reversion." How can there be a "legal ownership of the reversion" after the reversioner's interest has become completely extinct by the termination of the right to redeem? And surely it is settled in this state that after the property is struck off to a *bona fide* purchaser at a properly conducted and duly advertised sale, for the best price that could then be obtained, under a decree of the court, the equity of redemption has been extinguished. The confirmation of this sale on the sixth of September is conclusive proof that this was done. Appellant's equity of redemption, and with it his reversionary title, were extinguished on the twenty-sixth of August.

Second.

A mortgagee is entitled to the possession after the condition is broken.

Hart vs. *Stockton,* 7 Halsted, 322.

Mershon vs *Castree,* 28 Vr., 484.

Knight vs. *Cape May Sand Company,* 53 Vr., 16.

I have not seen where these cases, which are all in the Supreme Court, have been approved by this court,

but it has been settled by the Supreme Court so long that we consider it settled law.

The lease declared upon was made subsequent to the mortgage. The mortgagee immediately upon default, therefore, had the right of possession. Can it be contended that the decree of foreclosure and sale to the mortgagee took away that right?

Defendant was bound to attorn to the mortgagee, especially after the foreclosure had been followed by a decree, and the decree followed by striking off the property to the mortgagee at the judicial sale. It must not be forgotten that the order of confirmation was a judicial determination that the sheriff's sale was in all respects valid at the time of the sale.

It is true that in *Sanders* vs. *Van Sickle,* 3 Halsted, 313, it was decided that a mortgagee could not distrain for rent against a tenant, under a lease made *subsequent* to the mortgage for want of privity, and though it is said in *Sanderson* vs. *Price,* 1 Zabriskie, at page 646, that this case has been reversed in error on this very ground (which is strongly in our favor), nevertheless, the case, as it stands in the Supreme Court, is in our favor, for in that case the tenant attorned to the purchaser of the property, who was the plaintiff, at a sheriff's sale on execution against the lessor, *and before the execution purchaser had received his deed;* and this attornment was expressly held good and the purchaser was entitled to recover the rents.

In *Den* vs. *Stockton,* 7 Halsted, 322, it was decided that a mortgagee may maintain an action of ejectment to recover possession of the mortgaged premises, and *that the mortgagee does not divest himself of that right by filing a bill to foreclose and accepting the title under a sheriff's sale.*

In that case objections were made to the validity of the sheriff's sale, and the court held that if the sheriff's sale was valid the mortgagee could claim

title under the sale, and if it was void he *could claim title* under his mortgage, notwithstanding the foreclosure and sale. And in *Den* vs. *Wade* (Spencer, 291), it is held that neither a mortgagor in possession, nor his grantee, is entitled to notice to quit or demand of possession before action is brought.

It cannot be objected that there is no privity, in that the lease was not made by the mortgagor, for the lessor was the party defendant to the foreclosure and it is well settled that the officer making the sale was his representative. The attornment therefore does not come within the class made void by section 26 of the landlord and tenant act (3 Compiled Statutes, 3076), as being an attornment to a stranger. It should be noticed, furthermore, that that section expressly excepts from its operation *an attornment to any mortgagee after the mortgage has become forfeited.*

This appellee was therefore in a position where he would be liable to an action of ejectment, and to escape from this situation he recognized the rights of the mortgagee and paid him rent for the month of September.

It is beside the point to say that, in order to obtain a writ of possession under the statute, the purchaser would have had first to show a deed. This statutory remedy is granted for the relief of purchasers at such sales by affording additional remedy in the court of equity, but it in no way interferes with the mortgagee's right to the writ of ejectment. Moreover, it contains nothing to forbid a tenant from recognizing the right of the mortgagee to the rents after a forfeiture. If the tenant does not wait for a writ of possession he has not thereby in any way injured his former landlord.

Third.

The defense interposed is the same in legal effect as the former plea of eviction under a title paramount, and the facts maintain the plea.

But the appellant's claim to this rent is fully met upon the simple ground that the tenant had been evicted under a title paramount before the rent became due, irrespective of the fact that the purchaser at the sale was the mortgagee (18 Am. Enc. of Law, 297, 298). "An eviction of the tenant by a third per-"son under paramount title has the same effect in dis-"charging the tenant from liability to his landlord "for rent subsequently accruing as an eviction by the "landlord. *The tenant of a mortgagor is not liable to "him for rent accruing after the mortgagee who holds "under a mortgage given prior to the lease has en-"tered and notified the tenant to pay the rent to him."* (The italics are mine.) The cases cited as authorities are numerous but none of them from our courts. We have examined the following:

Poole vs. *Whitt,* 15 M. & W., 571.
Carpenter vs. *Parker,* 91 E. C. L., 206.
Hill vs. *Saunders,* 4 B. & C., 529.
Doe vs. *Barton,* 11 Ad. & El., 315.
George vs. *Putney,* 50 Am. Dec., 788.

The first case cited was in the Court of Exchequer and was an action of covenant on lease, and the plea was eviction under title paramount. It was proved at the trial that one Parr had impleaded the plaintiff and had judgment of elegity against his lands, etc., and that he had then gone to the tenant and called on him to pay the rent or he, Parr, would turn him out, on which defendant attorned to him and paid him the rent. It was held that the plaintiff was entitled to recover, but only on the ground that Parr's elegity only entitled him to the reversion expectant on certain mortgages made by the lessor. This does not

affect the principle stated in the text. Opinions by Pollock, *C. B.,* also by Alderson, Rolfe and Clapp, *B. B.,* all admitting that, had it not been for the intervening mortgage, which prevented Parr from demanding immediate possession, the mortgagee having the first right, the defense would have been complete. All the other cases examined by us fully sustain the author's statement, and it is a matter so well settled that it is not necessary to go into any further analysis. But the language of the court in *George* vs. *Putney* (4 Cushing, 351), recorded in 50 Am. Dec., 788, is so apt that we cannot resist quoting it. "But it is equally "settled that if the lessee is disturbed in his occupa- "tion by a party having a title paramount to that of "his lessor, so that he cannot legally continue his oc- "cupation under his lessor without rendering himself "liable as a trespasser to the other party, he may yield "the possession and take a new lease under him, or he "may abandon the possession and in either case he "will not thereafter be liable to pay rent to the origi- "nal lessor. Such an entry and disturbance are "equivalent to an ouster and this was the defense in "the case. It was proved that the plaintiff was di- "vested of his title by the levy of two executions on "the premises, and that the execution creditors before "the rent sued for became due and payable, entered "upon the premises, claiming title and threatened to "put the defendant out unless he would yield posses- "sion and attorn to them. * * * This evidence was "ruled to be admissible and that it was sufficient to "prove eviction by paramount title."

Fourth.

The appellant's rights, if any he have, are against the mortgagee who purchased at the sale in an action for an accounting.

The tenant's legal defense is complete. He is not bound to take up the question of the rights of mortgagor or mortgagee to the rents and profits pending the delivery of the deed. The rights of his lessor and his own rights having been entirely cut off in favor of the mortgagee, he was bound to make terms for himself as best he might. Whether the mortgagee is bound to account to the appellants herein for the rents and profits accruing between August 26 and September 25 is not a question that can be litigated in this action, nor in any other action to which the mortgagee is not a party. All the discussion, therefore, of this question in the cases cited in the appellant's brief are impertinent to the question here involved.

Fifth.

The judgment of the Circuit Court should be affirmed with costs.

EDWIN B. GOODELL,
Counsel for the Appellee.

INDEX.

Notice of Appeal.

Filed May 1, 1914.

Essex County Circuit Court.

ERNEST C. HINCK,
Plaintiff-Appellant,
vs.
MILTON L. COHN,
Defendant-Appellee.

Notice of Appeal.

To Edwin B. & Philip Goodell, Attorneys of Defendant:

TAKE NOTICE that the plaintiff appeals from the whole of the judgment entered in this court, to the Court of Errors and Appeals of the State of New Jersey, on the following grounds:

1. That the defenses 3, 4 and 5 of the answer set forth no defense to the cause of action of the plaintiff, because (a) it fails to show that the defendant was entitled to pay the rent to the person to whom it is therein alleged to have peen paid at the time of payment; (b), it fails to show facts from which any contractual relation existed between the defendant and the person to whom rent was paid; (c), it fails to show any facts from which it can be inferred that the plaintiff authorized the defendant to pay rent accrued to the person to whom payment was made, or that the person to whom payment was made was authorized either in fact or by law to receive payment for the plaintiff of the rent; (d), it fails to show any facts that would, in law, release the defendant from paying the rent to the plaintiff; (e), it fails to show any facts

from which it can be determined that the defendant was entitled to attorn to any person other than the plaintiff; (f), that the facts alleged do not show any title or right to the rent in the person to whom the same was alleged to have been paid; (g), that no facts are alleged showing that the plaintiff is bound by any payment made by the defendant to the person to whom alleged to have been made; (h) that the facts alleged do not show any privity of estate between the defendant and the person to whom rent was paid nor any facts by which the plaintiff was divested of his right to rent accruing on the lease.

(i) It fails to show any facts from which any payment can be construed that would bind the plaintiff.

2. That the facts alleged in the answer and in the stipulation of facts show that judgment should have been rendered for the plaintiff for the amount demanded because:

(a) The owner of the equity of redemption is entitled to rent accruing between the date of sale of demised premises and delivery of deed.

(b) The owner of the equity of redemption is entitled to rent accruing between the date of sale and the time set for the delivery of deed according to the contract between purchaser and sheriff selling the property.

(c) That the plaintiff was entitled to the avails of the land, in law, until the purchaser at the sale was entitled to the possession or had the right of possession.

(d) That rent, at law, is an incident of land and goes with the possession of the land, and the person to whom rent was paid was not at the time of payment, entitled to possession or right of possession.

3. That the motion of the plaintiff to strike out the defense should have been granted, for all the reasons hereinbefore set forth.

4. That it was error to grant judgment to the defendant, on the defense stated, for the reasons set forth hereinbefore.

5. That it was error not to grant judgment to the plaintiff upon the pleadings for the reasons herein set forth.

ROBERT M. BOYD, JR.,
Attorney of Plaintiff-Appellant.

Endorsed: "Received a true copy of the within notice this 30th day of April, 1914."

EDWIN B. & PHILIP GOODELL,
Attorneys of Defendant-Appellee.

Summons.

The State of New Jersey, to Milton L. Cohn. You are summoned to answer the annexed complaint of Ernest C. Hinck in an action at law in the Circuit Court for the County of Essex. And take notice that unless you file your answer to said complaint with the clerk of the said Circuit Court at Newark within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness Frederic Adams, a judge of the said Essex County Circuit Court at Newark, this seventeenth day of September, nineteen hundred and thirteen.

JOSEPH McDONOUGH,
Clerk.

ROBERT M. BOYD, JR.,
Attorney.

Complaint.

Filed October 9, 1913.

ESSEX COUNTY CIRCUIT COURT.

ERNEST C. HINCK,
Plaintiff,
vs.
MILTON L. COHN,
Defendant.
Complaint.

The plaintiff residing at Montclair, New Jersey, says that:

(1) On June 1st, 1912, plaintiff and defendant executed a lease of the premises No. 91 North Mountain avenue, Montclair, New Jersey, of which a copy is annexed hereto.

2. On September 1st, 1913, rent in the amount of $91.67 became due and payable on said day and the same is unpaid.

Plaintiff demands damages $91.67 and interest from September 1st, 1913.

ROBERT M. BOYD, JR.,
Attorney of Plaintiff,
481 Bloomfield ave., Montclair, N. J.

THIS INDENTURE, made this first day of June, in the year one thousand nine hundred and twelve, between Ernest C. Hinck of the Town of Montclair, in the County of Essex and State of New Jersey of the first part, and Milton L. Cohn, of the Town of Montclair, in the County of Essex and State of New Jersey of the second part.

Witnesseth, that the said party of the first part does hereby demise and lease unto the said party of the second part, all that certain house and premises situate on the east side of, and known as No. 91 North Mountain avenue, Montclair, N. J., with the appurtenances, and the sole and uninterrupted use and occupation thereof (except as hereinafter mentioned), for the term of one year from the first day of October, 1912, for the yearly rental of eleven hundred ($1,100.00) dollars, payable monthly, in advance, on the first day of each month in equal payments of $91.67 each.

And the said party of the second part does hereby agree to pay to the said party of the first part, his heirs, assigns, agents or attorney, the said yearly rent of eleven hundred ($1,100.00) dollars, at the time and in the manner aforesaid; and also will pay the water rent assessed on said property when the same shall become due. And the said party of the second part does further promise and agree that he will not re-let or under-let the whole or any part of said premises, nor assign this lease, nor use or permit any part thereof to be used for any other purpose than a dwelling house, without the written consent of the said party of the first part, his heirs, assigns, agents or attorney, under the penalty of forfeiture and damages; that the said party of the first part, his heirs, assigns, agents, or attorney, may enter into and upon said premises, at reasonable hours in the day time, to examine the same or to make such repairs or alterations therein as shall be necessary for the preservation thereof; and to exhibit them at any time during the last three months of the said term, from ten o'clock in the morning to five o'clock in the afternoon (Sunday excepted), to any person or persons, and to put up notices "To Let" or "For Sale" on the outside wall thereof.

Complaint.

And the said party of the second part does further agree to keep the premises in as good repair as the same shall be at the commencement of said term (wear and tear arising from a reasonable use of the same, and damage by the elements excepted); and at the expiration of said term to yield up the peaceable possession thereof to the said party of the first part, his heirs, assigns, agents or attorney.

And also, that upon the default of the said party of the second part, in the performance of the foregoing covenants and agreements, or any of them, the estate hereby created in and to the said premises shall, at the option of the party of the first part, immediately therefrom cease and determine. And also, that if the said premises, or any part thereof, shall become vacant during the said term, the landlord or his representatives may re-enter the same, either by force or otherwise, without being liable to prosecution therefor; and re-let the said premises as the agent of the said tenant and receive the rent thereof, applying the same, first to the payment of such expenses as he may be put to in re-entering, and then to the payment of the rent due by these presents, the balance (if any) to be paid over to the tenant, who shall remain liable for any deficiency; and the said tenant, hereby expressly waives the service of any notice in writing or intention to re-enter.

It is understood and agreed by the parties hereto, that a portion of the front porch is to be enclosed with wire screening, and the cost of the material and work is to be paid by both parties, each party paying half of the total cost. It is also further understood and agreed by the parties hereto that upon the party of the second part vacating the property, the screening is to become the property of the party of the first part.

It is further understood and agreed by the parties hereto, that the party of the first part will have the floor of the front porch painted.

It is further understood and agreed that the work is to be done at once.

IN WITNESS WHEREOF, the said parties have hereunto, in duplicate, set their hands and seals the day and year above mentioned.

E. C. HINCK, (L. S.)

MILTON L. COHN, (L. S.)

Signed, sealed and delivered in the presence of

RUSSELL P. SNYDER,

As to both parties.

Filed, October 9, 1913.

Endorsed: Service of the within summons and complaint is acknowledged for the defendant (but not as "served personally") this 18th day of September, 1913.

PHILIP B. GOODELL,

Defendant's Attorney.

Answer.

Filed October 8, 1913.

ESSEX COUNTY CIRCUIT COURT.

ERNEST C. HINCK,
Plaintiff,
vs.
MILTON L. COHN,
Defendant.
Answer.

The defendant, Milton L. Cohn, residing at No. 91 North Mountain avenue, Montclair, N. J., says that:

1. He admits making the lease mentioned in the first paragraph of plaintiff's complaint.

2. He denies the allegation contained in paragraph two, so far as it applies to the planitiff.

The defendant, for a further defense, says:

3. On August 26th, 1913, the reversion of the premises demised to the defendant in and by said lease was lawfully sold by the sheriff of the County of Essex to one Athenia T. Simpson, of the Town of Montclair, by virtue of a writ of execution issued out of the Court of Chancery of the State of New Jersey in a cause brought for the foreclosure of a mortgage upon said demised premises, made and delivered prior to the said lease, in which cause the said Athenia T. Simpson was complainant and the plaintiff was defendant, pursuant to a decree in said Court of Chancery entered in said cause on the 27th day of June, 1913, whereby the plaintiff was debarred and foreclosed of and from all equity of redemption in said demised premises.

Answer.

4. On the 2nd day of September, 1913, the defendant paid the said sum of $91.67, being the rent for the month of September, under said lease, to the said Athenia T. Simpson, the owner of the reversion of the said demised premises.

5. The said sale by the sheriff of the County of Essex was duly confirmed by the Court of Chancery by a decree in said cause entered therein on the 6th day of September, 1913. A deed of conveyance bearing date the 6th day of September, 1913, and duly executed, conveying the demised premises to the said Athenia T. Simpson, was delivered to her.

EDWIN B. & PHILIP GOODELL,
Attorneys for the Defendant.

Rule for Judgment and Consent.

ESSEX COUNTY CIRCUIT COURT.

ERNEST C. HINCK,
Plaintiff,

vs.

MILTON L. COHN,
Defendant.

The plaintiff having filed his complaint against the defendant in the above entitled suit and the defendant having answered thereto and it being heretofore stipulated between the parties, plaintiff and defendant, that the plaintiff was entitled to recover, provided the defenses numbered three, four or five in the answer of the said defendant fail to constitute a defense as a matter of law and this question having been raised upon a motion to strike out in conformity with the practice of this court; and the said motion having been argued and it being determined that such answer does constitute a defense as a matter of law, and, therefore, it appearing that according to the said stipulation the defendant is entitled to a judgment and a motion being made for judgment final on the pleadings accordingly,

It is on this twenty-first day of April, nineteen hundred and fourteen, ordered that judgment final be entered in favor of the defendant and against the plaintiff with costs to be taxed.

EDWIN B. & PHILIP GOODELL,
Attorneys for Defendant.

I consent to the foregoing order as to form and as to its entry without notice to me, such consent being given solely for the purpose of having final judg-

ment entered so that appeal can be taken therefrom and not in any sense to be construed as a consent judgment.

ROBERT M. BOYD, JR.,
Attorney of Plaintiff.

ESSEX COUNTY CIRCUIT COURT.

25201

ERNEST C. HINCK, *Plaintiff,* *vs.* MILTON L. COHN, *Defendant.*	*Action at Law on Stipulation. Judgment entered April 21, A. D. 1914. Costs* $44.18.

ROBERT M. BOYD, JR.,
Attorney of Defendant.

Judgment on stipulation in the above entitled action at law was rendered on the twenty-first day of April, A. D. nineteen hundred and fourteen, in favor of the said defendant Milton L. Cohn, and against the said plaintiff, Ernest C. Hinck, for the sum of forty-four dollars and eighteen cents, cost of suit.

Judgment entered and signed April 21st, A. D. 1914.

WM. S. GUMMERE,
Judge.

Certificate of Clerk.

ESSEX COUNTY CLERK'S OFFICE.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

I, Joseph McDonough, clerk of the Circuit Court, in and for the County of Essex in the State of New Jersey, do hereby certify that the foregoing is a true and correct copy of the notice of appeal and transcript of all the proceedings and judgment record in the case of *Ernest C. Hinck* vs. *Milton L. Cohn,* and the same is taken from and compared with the original record and as the same now remains on the files of said clerk's office.

In testimony whereof, I have hereunto set my hand and affixed the official seal of said court and county at Newark, N. J., this eleventh day of May, A. D. 1914.

JOSEPH McDONOUGH,

(SEAL) *Clerk.*

Stipulation.

New Jersey Court of Errors and Appeals

ERNEST C. HINCK,
vs.
MILTON L. COHN.

The parties hereby stipulate that the following facts may be introduced into the record.

1. That the final decree was in the usual form directing a writ of *fieri facias* to issue to the sheriff of the County of Essex to sell the demised premises, and further providing that "the defendants (that is the plaintiff in this suit and his wife) stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to so much of the said mortgaged premises (being the demised premises herein) as shall be sold as aforesaid by virtue of this decree."

2. That on the 26th day of August, 1913, at the time that the sheriff sold the said premises, the complainant in the foreclosure suit, Athenia T. Simpson, signed articles and conditions of sale on the sheriff's book, as follows:

"The articles and conditions for the sale of the defendant's property this 26th day of August, A. D., 1913, are as follows:

"1st. The highest bidder to be the purchaser.

"2nd. The purchaser will be required to pay twenty per cent. of the purchase money at the close of the sale and sign an acknowledgement of purchase in accordance with these conditions.

"3rd. The deed to be delivered at my office seven days after the date of confirmation of sale, when the balance of the purchase money will be required with

interest on the purchase money from the day of sale, and the purchaser to pay for the acknowledging of the deed.

"4th. Any person or persons purchasing at this vendue and not complying with the foregoing articles and conditions, the property so struck off and sold to him or them will be offered for sale a second time, and the first purchaser or purchasers to reap no benefit therefrom, but be held answerable for all loss and expense occasioned thereby.

"5th. This vendue is subject to adjournment.

JOHN F. MONAHAN,
Sheriff.

"I hereby acknowledge myself to be the purchaser of the tract of land and premises described in the annexed advertisement, for the sum of fifteen hundred dollars.

ATHENIA T. SIMPSON,
By PHILIP GOODELL,
Solicitor."

3. The sheriff's deed was delivered to Athenia T. Simpson on September 25, 1913.

EDWIN B. & PHILIP GOODELL,
Defendant's Attorneys.

ROBERT M. BOYD, JR.,
Plaintiff's Attorney.