Receivers in Mortgage Foreclosures

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THESIS

THE APPOINTMENT OF RECEIVERS IN MORTGAGE FORECLOSURES.

(with special reference to New York)

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1891.
Mr. Beatch in the preface to his work on receivers, the latest treatise on that subject, and one which is sure of meeting with universal approval, states that the law of receivers is the growth of the last twenty years. Had this statement been confined to the law of Railway Receivers, and more especially to the law of Receivers Certificates, its correctness would be undeniable. But the courts of equity, in certain cases, claimed and exercised this right of appointing receivers long before transportation by rail was introduced. However the law of receivers in general is very ably treated in the thesis of a fellow class-mate, and therefore we will at once take up the special branch of which we are to write, viz: When a Receiver is appointed in a Mortgage Foreclosure.

A receiver has been defined as "an indifferent person between the parties to a cause, appointed by the court, to receive or preserve the property or fund in
litigation, and receive the rents, issues and profits, and apply or dispose of them at the direction of the court, when it does not seem reasonable that either party should hold them."

(1) He is not the agent of either party to the action but an officer of the court, and being such an officer, the fund or property which is entrusted to him is said to be in the custody of the court, for the benefit of the one who proves his title to the same. Mr. High (2) speaks of a receiver as "the hand of the court," and very neatly compares him, as the executive officer of a court of equity, to the sheriff, as the executive officer of a court of law. Yet the authority of a receiver is more comprehensive than that of a sheriff, as the former is obliged to pay all the demands on the fund in his hands from that fund as long as it lasts, while a sheriff has only to satisfy his execution from the property on which he makes the levy. An appointment of a receiver has been held to be, in effect, an "equitable execution".

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(1) Cortleyeu v Hathaway, 64 Am. Dec. 478, note.
(2) High on Receivers. Sec. 1 & 2.
Although it is well established that equity has the power to appoint a receiver over mortgage premises for the protection of the mortgagor or mortgagee, or in aid of an action for foreclosure, and although the courts of equity, both of England and America, have long exercised this right, yet it is exercised with great caution. If there is a full, adequate, and complete remedy at law, a receiver will never be appointed. Extraordinary and imperative reasons must be shown in order to obtain the benefit of this extraordinary relief. The exercise of this power must depend upon the sound discretion of the court, and should only be granted when it appears fit and reasonable that some indifferent person, under approved security, should receive and distribute the issues and profits for the greater safety of all parties concerned. (1) The general rule is that if the mortgage premises are an insufficient security for the debt, or that there is imminent danger of waste, destruction or removal of the property, and

(1) Verplank v Caines, 1 John’s. Chan. 57.
that the mortgagor or the one personally liable, is insolvency, a receiver may be appointed in an action for foreclosure. There must in all cases be a strong special ground for the relief shown, and unless such ground is shown, a receiver will never be appointed of course.

There is also a strong distinction between cases in which the mortgagor has the legal title, and where the title to the property is still in the mortgagor, the mortgagor having only a lien upon the property as security for his debt. And this distinction as to the title is also, in fact, the distinction between the English or Common Law, and the American or Lien Theory of mortgages.

At common law, the mortgagor was deemed to be vested with a legal title and had a right to take immediate possession of the mortgaged premises. The mortgagor in possession was deemed simply a tenant at will or rather at sufferance, and hence the mortgagee
could sustain ejectment against him to recover possession without notice to quit.

In equity the relation between mortgagor and mortgagee were deemed very different. There the mortgagor was deemed the owner, the mortgage being deemed a mere "personal security," and the mortgagee was considered as having merely a lien or security for the payment of the mortgage debt which he could enforce by foreclosure. These equitable considerations were, of course, without their effects upon the legal rights and remedies of the parties, so that in courts of law the mortgagor in possession could not be deemed a trespasser, nor compelled to account for the rents and profits which he had actually received while in possession. Yet the mortgagee, under his right to enter, could thus intercept at any time the receipt of the accruing rents, and when the premises were in the possession of a tenant who had entered under the mortgagor prior to the mortgage, the mortgagee by giving him notice could com-
pel him to pay the rent to him. At one time, the right was supposed to exist whether the lease was prior or subsequent to the mortgage; but the later cases make a distinction, holding that without a voluntary attornment to the mortgage by the tenant under a lease subsequent to the mortgage there is no relation of landlord and tenant existing between them. In the case of a prior lease the mortgagee by giving the tenant notice of his mortgage could require the latter to pay him, as well unpaid rent which had accrued subsequent to the mortgage, as that which there after accrued.

In the state of New York the principles of the rule in English courts of law and equity have been essentially changed. Even before the revised statutes ejectment could not be sustained in our courts by the mortgagee without notice to quit; and under those statutes the right to maintain ejectment was wholly taken away. The mortgage is not, both at law and in equity in this state deemed simply a lien for the se-
curity of the mortgage debt, the mortgagor being deemed vested with a legal estate both at law and in equity.

Under this radical change in the relations which formerly existed between the parties, the legal remedies of the parties as against each other must necessarily be materially modified from what they were under the English rule. The power contained in the mortgage simply authorizes the mortgagor, upon the default of payment, to sell the premises at public auction, and to apply the proceeds of such sale to the payment of the mortgage debt.

Unless there be a specific clause to that effect, the mortgagor has no lien upon the rents and profits, and as a general rule the mortgagor, until the sale, is entitled to remain in possession. The mortgagee has no lien upon timber cut upon the premises in good faith, though the mortgagor was at the time insolvent, and the premises were an insufficient security for the mortgage debt. Nor has he, at law, any remedy for the rents.
for, until the sale, he has no legal title to possession. The power of sale only contemplates an appropriation of the proceeds of the sale of the premises to the payment of the debt. But the courts of equity, adhering to the ancient practice, under certain circumstances, will after default, in an action for foreclosure and sale, anticipate the final judgment of the court, by the appointment of a receiver, and, in effect, put the mortgagee in possession and allow him to divert the rents and profits of the mortgaged premises from the hands of the mortgagor, and hold them as additional security for the payment of the mortgage debt.

To entitle him to this species of "equitable ejectment," it must appear that the mortgage premises are an inadequate security for the debt, and that the mortgagor or other person liable for the mortgage debt is insolvent. This relief, it will be readily seen from the conditions necessary to its enjoyment, does not grow directly out of the relations of the parties.
or the stipulations contained in the mortgage; but out of equitable considerations alone. It is not therefore a matter of strict right, but is addressed to the sound discretion of the court. When the mortgagor is insolvent, and fails to pay at the day appointed, and the mortgaged premises are an inadequate security, as between the mortgagor and the mortgagee, it might well be deemed within the equitable discretion of the court to allow the latter to intercept the rents and profits for his better protection from loss. And this simple case seems to be the utmost extent to which this relief has been granted in the cases in which this question has come up, or to which it can be granted within any admitted principles of equity. When other parties have acquired rights before default, and especially before the happening of those contingencies which give the mortgagee any right to such relief, that is, when the right or interest of the third party accrued before the insolvency of the mortgagor, conflicting equities
may arise between which the courts would not decide, but leave the mortgagee to his direct remedy by judgment; and under such circumstances there seems to be no case in the courts of this state in which the mortgagee has been given this equitable possession of the premises before final judgment, or by such final judgment has been given possession, "nunc pro tunc" so as to be enabled to collect rents which had previously accrued. (1)

New Jersey, on the contrary, takes a stand directly opposed to that of New York. In commenting on the rulings of the courts of this state, the New Jersey court in the leading case of Cortleyeu v Hathaway, (2) says: "The rule so broadly laid down in New York is not sustained by precedents, and is not free from objections. No distinction is drawn between a first and a subsequent mortgagee. Their rights are entirely different. The first mortgagee has the legal right to the rents and profits, but a court of equity

(1) Syracuse City Bank v Tallman et al. 31 Barb. 201.
(2) 11 N.J. Eq. 39.
has been reluctant to appoint a receiver on his application, for the reason that he has a remedy at law by ejectment, by which he may get into the receipts of the rents and profits."

The court then adopt what they conceive to be the English rule as laid down by Lord Eldon in Berney V Sewell. (1) "The rule about receivers is clear: a mortgagee who has the legal title cannot have a receiver; he has nothing to do but take possession." It would almost seem that the New Jersey court was wrong, both in its criticism of the New York rule and its conception of the English rule. It fails to realize that in this state there is no distinction between a first and second mortgagee, both being denied a right of entry,—the one by statute, and the other by common law. It also fails to understand the English rule. The language of Lord Eldon clearly expresses both the rule and the reason, but in the case before the court there were no allegations of insufficiency and insolvency.

(1) 1 Jac. & W. 647.
A receiver is appointed independent of these considerations, on the ground that where there is a right, there should be a remedy, if not at law, then in equity. A thorough examination of the English cases will reveal the fact that insolvency and insufficiency will, of themselves, constitute a ground for the appointment of a receiver, whether or not the mortgagee is entitled to enter. They constitute "special circumstances" which have always been deemed sufficient ground for the relief. "A special circumstance is any fact by reason of which the mortgagee's security is imperiled or greatly impaired." (1) Where the mortgagee may take possession, and is compelled to sue in ejectment, it would seem that the court should appoint a receiver, because, pending the ejectment the rents and profits of the estate are being diverted from him, and he needs all the rents and profits, when his security is insufficient and the mortgagor is insolvent, for the satisfaction of his debt. (2)

(1) White v Small, 22 Beav. 72.
(2) Shepteins v Olive, 2 Brown's Chan. 78.
In Nevada the rule is substantially the same as that of New York, although the reasoning from which the rule is deduced is very different. In Hymen v. Kelly (1) the court says: "The legislature having forbidden the mortgagee to pursue the common law remedy of ejectment, would, it seems, be rather a reason for a more liberal exercise of the chancellor's powers, to protect the security which he has for his debt." And in a subsequent part of the opinion, they apparently rely on the English decisions to support this reasoning. The English chancellors appointed a receiver because the mortgagee was entitled to the rents and profits but could not get possession at law. The conclusion of the Nevada court is, perhaps, correct, but the reasoning seems somewhat absurd.

California has a statute in all respects like the Nevada statute; and yet the court refused to appoint a receiver for insolvency and insufficiency, and alleged as a reason for such refusal, the very same which

in Nevada is held to be good ground for his appointment. The courts say: (1) "Our statute forbids the mortgagor from recovering the mortgaged estate, and confines his remedy to a foreclosure. The same reason, therefore, does not exist as by the English rule for the appointment of a receiver to collect the rents and profits pending the litigation." This court overrules the New York decisions, and makes the same mistake as the Nevada court in regard to the English rule.

Michigan in the case of Wagner v. Stone (2) follows the California decision, while probably the best case in this country supporting the New York decisions, is Schieber v. Corey. (3) It falls into no errors and gives sound reasoning for its ruling. The court says: "Although the mortgagor has no legal estate in the lands mortgaged, yet this court has recognized that he has an equitable interest which the courts are bound to protect; and that the mortgagor must in some respects be considered in possession for the benefit of the

(1) Gray v. Ide, 6 Cal. 101.
(2) 36 Mich. 364.
(3) 43 Wis. 208.
mortgagee. He holds the estate mortgaged, in some respects as a trustee for the benefit of the mortgagee, and a court of inquiry will interfere to prevent the destruction or waste of the mortgaged estate by the mortgagor and those claiming under him, when such destruction or waste endangers the security of the mortgage."

All of these decisions rest in some degree on the provisions of the statutes of the several states. In New Jersey alone of the states mentioned, does the common law mortgage with its peculiar incidents exist. It will, therefore, be necessary to enquire whether or not its rule for the appointment of receivers is followed in states having a similar mortgage.

In Mississippi, where, after foreclosure, the mortgagee may enter, it is expressly repudiated. The court, after an able argument by counsel, proceed to consider the rules which have guided courts in passing on an application for such relief. They conclude that wherever the rents are necessary for the payment of the
debt, they will secure them by the appointment of a receiver whether or not the mortgagee may enter. They say: (1) "Regarding the mortgage as more especially a security for the payment of a debt, we think the better rule to be that which will grant the receiver or not, as it may or may not be an essential means to pay the debt. There can be no necessity for this auxiliary remedy if the mortgagor is solvent and is able to pay the deficiency. In such cases, the creditor ought to be left to his legal remedy to get at the rents.

The Supreme Court of Tennessee hold the same doctrine; (2) also the courts of Kentucky, (3) and South Carolina. (4) We have not been able to find a case outside of New Jersey which holds the contrary.

Thus we see that there is much confusion over this subject in the courts of the different states; and this, we think, is due to the failure of the courts to apprehend the possible consistency of the English and New York rules. Whenever the chancellors have departed

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(1) Myers v Etsell, 48 Miss. 403.
(2) Williams v Noland, 2 Tenn. Chn. 151.
(3) Douglass v Cline, 12 Bush. 608 - 22.
(4) Boyce v Boyce, 6 Rich. Eq. 302.
from the New York rule, they rely on the English cases. When they adopt the New York rule they condemn the English cases. They seem to have failed to realize that these two rules apply to an entirely different state of facts. Most of the English cases allow a receiver to aid the mortgagee to collect the rents of property to which he is entitled by virtue of the mortgage, where a legal remedy is inadequate or does not exist.

In New York, on the contrary, the receiver is allowed because the rents are needed for the satisfaction of the debt, when the property is insufficient and the mortgagor is insolvent. The mortgagee has no legal right to the rents, and of course no legal remedy; but it is not on this account that he is entitled to relief, as the Nevada courts seem to imply. The California court is right in its position, that the fact that the legislature has taken from mortgagees the right of entry is good ground for refusing to appoint a receiver under the English rule. Where it erred, was in
failing to give due prominence to insufficiency and insolvency, which of themselves may constitute sufficient grounds for the relief; and for the reason, that where the mortgaged property is inadequate to pay the debt, and the deficiency cannot be made up out of the mortgagor, equity will, after forfeiture, take possession of the rents and apply them to the debt. To compel a man to bring ejectment under these circumstances would be to compel him to incur additional expense where he is already insufficiently secured, and in the mean time to lose the rents which properly belong to him. The legal remedy is inadequate and equity will interfere.

Some of the courts have even gone farther. In Mississippi (1) it has been held, that where the property is insufficient to pay the debt, a receiver should be appointed, whether or not the mortgagor is insolvent. To appoint a receiver under such circumstances, cannot work an injury to the mortgagor, provided he be solvent. He has nothing to do but to redeem. It is difficult

(1) Hill v Robertson, 24 Miss. 368.
to prove a man's solvency, and such a rule presumes it
after default, thus relieving the mortgagee of the bur-
den. Most of the states, however, follow the New York
rule, that after default and pending foreclosure a re-
ceiver will be appointed to take possession of the
mortgaged property, whenever the property is insuffici-
ent to pay the debt, and the person liable is insolvent.

We have now seen when a receiver in a suit for
foreclosure will be appointed in the several states.
these rules seem to be well settled; yet in regard to
the New York rule, and hence in regard to the rule of
most of the states, an objection arises which seems to
have some foundation.

Suppose a motion is made for the appointment of
a receiver in a foreclosure suit. The motion is not
based on grounds set forth in the code, but simply on
the alleged inadequacy of the security, and insolvency
of the one personally liable. Can a receiver be
appointed? It would seem, after a careful study of the
cases, that unless the rents and profits have been specifically pledged, the court has no jurisdiction for such an appointment. Or, it might be more modest, instead of stating the proposition, to ask the question, Whether the court now has jurisdiction to appoint a receiver on the grounds of inadequacy of the security and insolvency of the debtor, in the foreclosure of a mortgage, where the rents and profits have not been specifically pledged?

Such a question never could have arisen under the late code but now arises by reason of the changes made by the present code. As has been shown, it was the undoubted practice of the old court of Chancery to appoint such receivers; but the code of 1848 (1) did not contain, in the enumeration of grounds for the provisional remedy of receiver, the one under discussion. But after a specific enumeration, there followed a general clause authorizing an appointment in such other cases as might be according to previous practice.

(1) Sec. 244, Sub. 5.
So for thirty years, the court continued the practice of appointing on such grounds, by virtue of this provision. The repealing act (1) repeals section 244 subdivision 8 of the code of 1848, and the new code contains no provision of similar import. (2) For such power, therefore, resort must now be had to the general jurisdiction of the court as the successor to the court of Chancery. Yet many grave question, unlooked for, and difficult of solution, have arisen by reason of statutory enactment; and so the revised statutes are responsible for the question now raised. (3) "No action of ejectment shall hereafter be maintained by mortgagee or his assigns or representatives for the recovery of the possession of the mortgaged premises." This would seem to be a short concise statement with no other meaning than that of allowing the mortgagor to retain possession.

"A mortgagor in possession in accordance to English law is regarded as a strict tenant at will of the

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(1) Laws of 1874, Chapter 417.
(2) Sec. 718.
(3) 2 R.S. 312, Sec. 57.
that to which he was legally entitled, to get which he
might, if he chose, have gone to law in ejectment. In
giving him a receiver, Chancery simply put him in the
way of obtaining through its machinery what was his own.
There is no real difference between the results of the
two actions. Both were different means to the same
end. But "he who seeks equity must do equity," or,
in once sense of the phrase, he who invokes the aid of
a court of equity cannot always be allowed to insist
on his full rights at law. When a mortgagee had
chosen to allow a mortgagor to remain in possession and
received the rents and profits to his own use, there
could be no equitable reason, upon a bill of foreclosure,
why a mortgagor should be deprived of his possession
before the decree, if the land were an adequate secur-
ity or he solvent. In such a case, he would be like-
ly before decree to avail himself of his equity of re-
demption. The equitable rule, therefore, grew up,
that when the mortgagee simply came into equity to cut
mortgagee, who being the legal owner, is entitled at law to the immediate possession, and to the receipt of rent if the land is in lease, and he may enter upon the mortgagor at any time, even before default in payment of the mortgage money, and eject him. The mortgagor consequently has no power of making leases that will bind the mortgagee, and when he collects rent he is only to be considered as receiving it in order to pay the interest which accrues on the mortgage, by an implied authority from the mortgagee, until the latter determines his will as to "his possession." (1) We may accept this as a correct exposition of the prior law of this state. (2)

It is apparent that the jurisdiction in equity to appoint a receiver in a foreclosure suit upon the grounds under discussion, was based upon this legal relation of mortgagor and mortgagee. The mortgagee owned the rents as well as the land. When, in a suit by a mortgagee out of possession, to foreclose the equity of redemption, he applied for a receiver, he asked only for

(1) Taylor's Land. & Tenant, 7th Ed. Sec. 120. (2) Johnson v Hart, 3 John's. Cases, 322. 1802.
off the mortgagor's right of redemption, a receiver would not be appointed unless the security was inadequate and the owner of the equity insolvent.

In 1830 came the abolition of ejectment as against a mortgagor in possession. The full bearings of that change were not at once perceived. The doctrine that the mortgage is but "a shadow of the debt," "a security of a personal nature" or "a mere chose in action" was of slow but logical growth. No such expressions are to be found in the opinions of Chancellor Walworth or the vice-chancellors. The idea that had existed for so long, that the legal title was in the mortgagee, could not be done away with at once, merely by virtue of an act abolishing a particular kind of action against a class of persons. Now the above expressions are common. "The mortgagor in law and equity is regarded as the owner of the fee, and the mortgage is a mere chose in action, a security of a personal nature." (1) Ever since 1830 from one case to another

(1) Trustees v Wheeler, 61 N.Y 115.
Trustee v Marsh, 54 N.Y. 604.
the courts have been engaged in finding out and determining the result of this change, but it has been slow work. Time was needed to adjust the bearings of this change. "It is doubtless somewhat incongruous, in view of the doctrine now well settled in this state, that a mortgage is a mere security and not a title, to define it as a conveyance of an estate or interest in the land mortgaged, but the character of mortgages as mere choses in action was not as well understood when the Revised Statutes were enacted, as it has been since." (1) And though no such thing exists in this state at the present day, the term of Equity of Redemption is often used both by courts and counsel.

However, as time went on, cases came up and various questions were solved. Among these cases was one in 1845, Lofsky v. Manzer, holding that the filing a bill in foreclosure, of itself, creates no lien on the rents. Later in 1852, it was held that a mortgagee is entitled to the rents to his own use down to

(1) Decler v Boyce, 63 N.Y 220.
(2) 3 Sand's. Chan. 69.
the time when the purchaser at the sale under fore-
closure is entitled to the possession of the land. (1) No question of a receiver was there involved. The Chancellor continued to appoint receivers on the same ground after the Revised Statutes as before, the first reported case being Bank of Ogdensburg v. Arnold. (2) No doubt as to the right seems to have been raised until 1844, (3) when the vice-Chancellor disposes of it by saying, that having been done by the Chancellor, he is not at liberty to depart from it. But he adds: "At the same time, I confess myself unable to discover the analogy or the principle under our laws in relation to the nature or true character of a mortgage, which authorizes such an interference with the legal rights of the mortgagor, unless indeed he has by the express terms of the contract pledged the rents and profits. — as well as the corpus of the estate — as security for the debt."

From that time the question was not again brought up until 1858, when similar views were advanced by

(2) 5 Paige, 38.
(3) Post v. Dorr, 4 How. 415.
Chief Judge Andrews, then counsel in the case of Syracuse City Bank v Talman. (1) But the court did not pass upon this point. And from that time down to the present, we have been able to find no case in which this point was the one at issue. So the question, at present, is really an open one, and to be looked at upon principle.

Now, under what principle, upon what theory, by what right, can the court take from their owner the rents and profits of his land, to which he has the legal and equitable right, of which he has not made pledge, and vests them in a receiver? Why is inadequacy of security and insolvency of the debtor any more reason for appointing a receiver in a foreclosure, than in any other action? Principle says, and it might be said that the law is well settled, that courts whether at law or in equity, are to construe, but not make contracts. Prior to 1830, a mortgagee's contract gave him title to the land and hence a right to the rent and profits which

(1) 31 Barb. 201 at p. 204.
followed the title.

Since 1830, his contract gives him no title to the land, no rights to the rents and profits, but simply "security of a personal nature." If then a court appoints a receiver, it makes a contract which the parties had no intention of making, and it gives the mortgagee a security never contracted for. "Equity follows the law;" being no longer entitled to the rents and profits at law, how is he in equity? To say that the rents grow out of the land, and hence the mortgagee is entitled to them, begs the question. Rent is not an appurtenance to the land but a profit issuing out of it. It is "an incident to the reversion." (1) The legal title to the rent must follow the legal title to the land. The land has been pledged to the mortgagee as a security; he can only work out a claim to the rents by means of the claim to the land; and all the right he has in law or equity in an ordinary foreclosure suit is to have the land sold to pay his debt. Then begins

(1) Taylor's Land. & Tenant, Sec. 184.
his right to the rents, if he has been the purchaser. His application for a receiver, upon the grounds under consideration, is no longer asking for discretion to be exercised in favor of his legal rights, but is wholly an application to give him further security which he did not see fit to exact when he made his contract. No suit can be maintained by a creditor to compel his debtor to give him further security. He must either realize on the security he has or get judgment for his debt. In refusing to adopt our rule in New Jersey, even though ejectment there lay against the mortgagor, Chancellor Williamson said in Cortelyeu v Hathaway, (1) "A mortgagee takes his security with full knowledge of its value, and if he takes an inadequate security it is his own fault." Now applying this rule in a state where the title to the land and therefore to the rents, in law and in equity, is in the mortgagor, we submit it affords a reason for denying to a mortgagee a receiver on the grounds merely of inadequacy and insolvency.

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(1) 3 Stock. 39.
We contend that even if courts still have the power to appoint receivers over mortgage premises, a court of equity ought not to exercise it solely on the grounds under discussion. Why should an insolvent owner be forced to make good any unforeseen depreciation in the value of the property, and be compelled to lose the rents? Does not his creditor get all he has to give—the land itself, or its value? The only answer is, the debtor will be held in judgment for a deficiency, therefore it can make no difference to him, if that deficiency is lessened before hand by a sequestration of the rents. In reply to that, we would say that a receiver is not asked for or appointed, if the person liable for the deficiency is solvent. Therefore, in a foreclosure case, you do what you are not allowed to do in any other case, you get a lien on a debtor's property, in advance of a judgment because he is insolvent. You cannot get an attachment in an ordinary action on any such ground. You cannot get a receiver
in any other action on any such grounds. You cannot require an executor or trustee to give bond on any such ground. Yet you maintain that a court of equity can do for you, who would take the last cent from your insolvent debtor, what is not done even in courts of law, which are always supposed to follow the letter of the bond to the farthest extent. We maintain that this is wrong, that it always was wrong as between man and man that receivers should be appointed on such ground alone, wrong in law, and above all wrong in equity. But whether it was or not prior to 1860, since then it is positively illegal.

The cases in which receivers have been appointed present a curious conglomeration, when an attempt to coordinate them is made. It would seem that if some are sound, others cannot be. They cannot be harmonized on any general theory. But the crowning case is an unreported one, where a mortgagor, residing on the mortgaged premises was compelled to attorn to a receiver and
to pay rent. This is a logical decision. Now granted that a mortgagor's right to rent from his tenant can be taken away by a receiver in foreclosure, it logically follows that if he occupies the premises himself, thereby practically receiving rent, he can be made to attorn to a receiver as any other tenant. But remembering that down to the time of sale, he has the legal title to those premises, vested in himself, is it not "reductio ad absurdum" to hold that he must pay rent for the use of his own land, and pay the same to one who has no right at law or equity to oust him from possession? Is not this taking of the rents a practical ousting? Is there not something radically wrong in a theory which produces such a result?

And now to sum up. The point we have tried to make is that the Revised Statutes in taking away the right of a mortgagee to maintain ejectment, took away, as the doctrine is now firmly settled, his legal title to the mortgaged premises; converted the equitable title
of the mortgagor into a legal one, or rather, as it gave no equitable title to the mortgagee, it superadded to the equitable title of the mortgagor the legal title as well. It therefore took away the foundation on which alone existed the jurisdiction of Chancery to appoint a receiver on the grounds under discussion; the foundation disappearing, the jurisdiction could not thereafter be maintained. During the existence of the code of 1848, in the way shown at the outset, the point could not be well taken. But that way having ceased to exist by express repeal, and no similar provision taking its place, the question since 1877, has been an open one.

It is to be decided on principle. Principle says: "equity must follow the law", rent must follow the land, courts construe, do not make contracts. If a specific pledge of the rents is not mentioned in the bond, the law does not give it, the court cannot award it. If this be sound, the usual sequestration of rents and
profits in a foreclosure suit, by means of a receiver, appointed only on the ground of inadequacy and insolvency, is a "taking of property without due process of law."