

Case No. 4,981.

FOSTER v. RHODES.

{10 N. B. R. (1874) 523.}¹

Circuit Court, E. D. New York.²

BANKRUPTCY—RECEIPT OF RENTS OF MORTGAGED PROPERTY BY
ASSIGNEE—FORECLOSURE—RIGHTS OF MORTGAGEE.

1. Where an assignee in bankruptcy receives the rents of mortgaged property, it must be distributed among the general creditors of the bankrupt. If the mortgagee desires it to be applied specifically to his lien, he must not only show the insufficiency of his security without the pendency of the rents and profits, but he must also intercept the rent before it can reach the assignee.
2. Where a mortgagee completes his foreclosure without intercepting the rents, he cannot afterwards, on finding the property insufficient, have the rents applied; whatever rights to intercept the rents he may have had ceased with the completion of the foreclosure.

[Cited in *Teal v. Walker*, 111 U. S. 251, 4 Sup. Ct. 425.]

The plaintiff [William Foster] claimed a lien on certain assets of the bankrupt [James F. Rhodes] in the hands of the assignee; consisting of rents derived from two houses owned by Rhodes prior to his bankruptcy, under leases made as early as May 1, 1871. The plaintiff claims his lien or priority in these rents, by virtue of two mortgages on these two houses, which were made by the bankrupt twenty days later than the leases. Each mortgage was made to secure the sum of two thousand five hundred dollars and interest. Under a thirty days' interest clause, both became due at the option of the petitioner, on the 26th of December, 1871. Rhodes' bankruptcy dates from the 11th day of November, 1871. About January 1, 1872, the plaintiff took measures to foreclose his two mortgages. On the 30th day of March, 1872, the usual decrees of foreclosure were made therein, and the property subsequently sold. The rents, amounting to one thousand dollars, became due after Rhodes became a bankrupt, and before sale of the premises. Under the above facts, the plaintiff, after sale, finding the proceeds of the mortgaged premises greatly insufficient to pay his debt, applied to have the rents received by the assignee paid to him, claiming a specific lien by virtue of a clause in the mortgage, after the granting part, in these words: "Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, and the reversions, remainders, rents, issues, and profits thereof."

Mr. Johnson, for plaintiff, made the following points:

First. A mortgage operates as an assignment of the rent due under a lease made prior to the mortgage. 1 Washb. Real Prop, p. 570; *McKircher v. Hawley*, 16 Johns. 289; *Demarest v. Willard*, 8 Cow. 206; 1 Doug. 279.

Second. The mortgage conveys the rents, issues, and profits of the premises.

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Third. There are no cases that hold that the mortgagee has not a lien on rents accruing after default made.

Fourth. But for the bankruptcy proceeding we had a right to acquire a lien; this was a part of our security, and entitles us to the relief prayed. In re Dey [Case No. 3,870].

W. W. Bliss, for assignee.

HUNT, Circuit Justice. The petitioner insists that by virtue of his mortgage, he became assignee of the rents under a lease made prior to the mortgage. I think the creditor can no more ask for an incident under this mortgage, such as the rents, than he can ask for the principal, that is, the land. His mortgage and all rights and claims incidental and collateral as well as direct and immediate, are at an end. By the foreclosure, every right or claim, in whatever form it existed, is terminated. If he ever had a claim to the rents, it was ended when the foreclosure was complete. Judge BENEDICT'S opinion is satisfactory to me. The order should be affirmed.

[NOTE. Judge Benedict's opinion in the district court is here published as Case No. 4,963.]

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² [Affirming Case No. 4,903.]