

against whom, or against whose grantees the bill was filed, and that, consequently, there was no necessity to make him a party to the bill, upon the ground, that his rights may be regarded as represented by those who are before the court, and *Story's Equity Pleadings*, 146, section 151, is referred to, in support of the proposition. The authority, however, relied upon, states expressly, (after saying, that in their absence, that is, the absence of such tenants, their rights will be so far protected as not to be absolutely concluded in the suit,) that if it is intended to conclude their rights in the same suit, such tenants or lessees, must be made parties to it. And that it is not unusual, if the existence of their rights is suggested to the court at the hearing, to frame the decree in such a manner, as expressly to guard them from prejudice. The same rule is asserted in nearly the same terms in 1 *Daniel's Ch. Pr.*, 311, 312.

It is a circumstance not unworthy of notice in the present case, that the lease from the mortgagor to Shipley, of which Clements is the assignee, is for ninety-nine years, with a covenant for its perpetual renewal, and that the latter has made considerable improvements upon the premises, and that this lease was made by a party, who, by the terms of the mortgage, was to retain possession until default should be made by the non-payment of interest, the annual payment of which, by the terms of the instrument, would preclude a foreclosure of the mortgage. An interest derived from such a mortgagor, with this character of permanence attached to it, and attended with a considerable outlay of money, in the improvement of the property, would seem to require, before the rights of the party are absolutely concluded, that the "regular and established course of judicial proceeding should be pursued."

Cases have been cited in the argument to show, that in a bill to foreclose a mortgage, subsequent incumbrancers are not necessary parties, but as this question need not in this case be decided, and there are conflicting authorities upon the subject, an investigation of it does not appear to me to be called for.

My opinion, upon the question raised, is, that the petitioner