MORTGAGE DEFICIENCIES IN NEW JERSEY

Deficiencies arising upon foreclosure and sale of mortgaged premises have had a relatively long and varied history in New Jersey. There are few reported cases and no legislation before the period of reconstruction following the Civil War. The obligor had his remedy upon his bond by an action at law[1] without first being required to exhaust his remedy upon the mortgage.[2] The equitable nature of the assuming grantee's undertaking was early recognized, and Chancery clothed itself with exclusive jurisdiction for its enforcement.[3] Entry of judgment upon the bond did not impair the security of the mortgage, but the Court of Chancery protected the mortgagor by restraining the sale of the equity of redemption in the mortgaged premises upon an execution at law in satisfaction of the mortgage debt.[4] Chancery seems to have been without jurisdiction to decree, in the suit brought to foreclose a mortgage, the payment of a deficiency which might arise upon sale, except where a special equity was shown to exist.[5]

The Act of March 29th, 1866,[6] confirmed and enlarged the

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[1] Klapworth v. Dressler (Ch. 1860), 13 N.J. Eq. 62, at 65.

[2] Flanagan v. Westcott (Ch. 1856), 11 N.J. Eq. 264.

[3] Klapworth v. Dressler, *supra* note 1; Pruden v. Williams (Ch. 1875), 26 N.J. Eq. 210, at 211. See *post* pages 47 *ff*.

[4] Flanagan v. Westcott, *supra* note 2; Severns v. Executors of Woolston (Ch. 1842), 4 N.J. Eq. 220; Van Mater v. Conover (Ch. 1866), 18 N.J. Eq. 38. "If the mortgage creditor, after decree of foreclosure, proceed against his debtor for the mortgage debt, the decree of foreclosure is *ipso facto* opened, and the debtor let in to redeem", Osborne v. Tunis (E. & A. 1856), 25 N.J. Law 633 at 651. The equitable rule seems to have been incorporated bodily into the 1880 Act. See *post*, pages 28 and 29.

[5] Klapworth v. Dressler, *supra* note 1. The obligor's insolvency was regarded as a sufficient reason for decreeing in the foreclosure action that an assuming grantee pay the deficiency which might arise upon sale. See Pruden v. Williams, *supra* note 3.

[6] Nix. Dig. 119; Rev., p. 118, Sec. 76. * * * "it shall be lawful for the Chancellor, in any suit for the foreclosure or sale of mortgaged premises, to decree the payment of any excess of the mortgage debt above the net proceeds of the sale, by any of the parties to such suit who may be liable, either at law or in equity, for the payment of the same". In Rev. 1877, p. 118, this section appears with a proviso that there must be a prayer for a deficiency in the bill. By rule 38 of Chancery (Nix. Dig. 1868, p. 1096) notice of the prayer had to be served with a subpoena ticket. The litigation involving the 1866 Act, and the 1877 revision forecast by half a century the Legislation of 1932 (P.L. 1932, Chap. 231, page 509) providing that no action be instituted against any party answerable upon the bond unless such party is joined in the proceeding to foreclose the mortgage.

power assumed by the Chancellor in *Klapworth v. Dressler*,[6a] and gave legislative recognition to the existence of an equitable right arising by virtue of the covenant of assumption of mortgage contained in a deed conveying mortgaged premises. The provisions of the Act were not mandatory, so that failure to join as parties defendant to the foreclosure action, grantees of the mortgaged premises who had assumed payment of the mortgage,[7] or failure to enter a deficiency decree against a guarantor of the mortgage who had been joined as a party defendant to the foreclosure suit[8] did not bar a subsequent action in Chancery against the grantees or the guarantor.

In 1880, the Legislature laid the groundwork for the present mortgage deficiency structure.[9] The practise of entering deficiency decrees in foreclosure suits was abolished[10] and it was made "lawful first to proceed to foreclose the mortgage" before suing upon the bond[11] for a deficiency. The Act of 1866[12] was thereby repealed and legislative disapproval of the doctrine of *Klapworth v. Dressler*[13] registered. Provision was made for the redemption of mortgaged premises upon suit for a deficiency.[14] Nowhere in the Act, however, is any express provision made for three numerically important groups; namely, mortgagors whose mortgages secure notes;[15] grantees of mortgaged premises who accept deeds containing covenants

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[6a] *Supra* note 1.

[7] Pruden v. Williams, *supra* note 3.

[8] Jarman v. Wiswall (Ch. 1873), 24 N.J. Eq. 267.

[9] P. L. 1880, Chap. 170, page 255 entitled "An Act concerning proceedings on bonds and mortgage given for the same indebtedness and the foreclosure and sale of mortgaged premises thereunder".

[10] P. L. 1880, Chap. 170, page 255, Sec. 1.

[11] *Id.* Sec. 2: "That in all cases where a bond and mortgage has or hereafter may be given for the same debt, it shall be lawful to proceed first to foreclose the mortgage, and if at the sale of the mortgaged premises under said foreclosure proceedings, the said premises should not sell for a sum sufficient to satisfy the said debt, interest and costs, then, and in such case, it shall be lawful to proceed on the bond for the deficiency, and that in all suits upon the bond, judgment shall be rendered and execution issue only for the balance of the debt and costs of suit."

[12] Nix. Dig. 119; Rev. p. 118, Sec. 76.

[13] *Supra* note 1.

[14] P.L. 1880, Chap. 170, page 255, Sec. 3. Redemption was limited to the owner of the mortgaged premises at the time of foreclosure and sale.

[15] The provisions of the Act do not apply to mortgages securing notes. Asbury Park and Ocean Grove National Bank v. Giordano, 3 N.J. Mis. R. 555, *affirmed* (E.&A. 1926) 103 N.J. Law 171.

of assumption;[16] and makers of mortgages cut off by the foreclosure of prior mortgages.[17] The apparently deliberate and studied neglect of the three groups enumerated has persisted to the present day.

The laxity of the provisions of the second section of the 1880 Act[18] was soon apparent and resulted in the amendment of 1881.[19] The provision for redemption was enlarged to apply to any person against whom a judgment for deficiency was entered[20] instead of being limited to the owner of the property at the time of the foreclosure and sale as in the 1880 Act.[21]

It was but natural that the legislation effecting such radical changes in the law should at once become the target of attack upon constitutional grounds. The provision eliminating the entry of a decree for a deficiency in the foreclosure action was upheld as constitutional in its application to mortgages executed before its passage.[22] The statute being procedural only, there was no impairment of the obligation of contract in violation of the constitutional guarantee.[23] While the Act did deprive Chancery of jurisdiction to enter a decree for deficiency in the foreclosure action, no person was deprived of a remedy in violation of the constitutional prohibition, because a more efficacious remedy of the same sort remained, and the Legislature lawfully may take away one of two or more equally effective remedies of the same sort.[24] Nor was this provision tainted with the unconstitutionality of the second and third sections of the Act, since it was clearly separable from the rest of the Act and could stand alone.[25]

The Courts had no difficulty in finding the second and third sections of the Act unconstitutional in their application

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[16] See *post,* page 32.
[17] See *post,* page 31.
[18] See *supra,* note 6.
[19] P.L. 1881, Chap. 147, page 57.
[20] *Id.* Sec. 2.
[21] See *supra,* note 14.
[22] Newark Savings Institution v. Forman (Ch. 1881), 33 N.J. Eq. 436; Allen v. Allen (Ch. 1881), 34 N.J. Eq. 493; Naar v. Union etc. Land Co. (Ch. 1881), 34 N.J. Eq. 111; The Chancellor v. Traphagen (E.&A. 1886), 41 N.J. Eq. 369; Toffey v. Atcheson (Ch. 1886), 42 N.J. Eq. 182; Hill v. Hill (E.&A. 1923), 95 N.J. Eq. 233, at 239.
[23] Const. New Jersey, Art. 4, Sec. 7, Par. 3.
[24] Newark Savings Institution v. Forman, *supra* note 22.
[25] Newark Savings Institution v. Forman, *supra* note 22.

to mortgages in existence at the time of its passage.[26] There was a clear impairment of the obligation of contract. The time for payment of the bond was enlarged beyond the period named in it for payment and there was substituted for the obligation of the bond, an obligation to pay the amount of a deficiency. The remedy upon the bond was postponed until the mortgage security was exhausted, conferring upon the obligor an advantage he did not have before.

In interpreting the Act, and in applying its provisions to cases, the Courts have ranged from extreme liberalism to a conservatism equally extreme. The Act has been held to have no application to an action by a grantor against a grantee upon the covenant of assumption contained in the deed,[27] nor does it operate to prevent the mortgagee from maintaining ejectment notwithstanding the mortgage has not been foreclosed.[28] Where the obligor has died, the holder of the bond and mortgage may present his claim to the personal representative[29] and, if notice is served disputing the claim, suit may be brought without first foreclosing the mortgage.[30] Where, however, the decedent has only assumed payment of the mortgage, the claim cannot be proved until after foreclosure.[31] Suit may be instituted upon the bond immediately after the foreclosure sale, although the sale has not as yet been confirmed by the court.[32] The failure to include in the fore-

[26] Baldwin v. Flagg (Sup. 1881), 43 N.J. Law 495; Coddington v. Executors of Bispham (E.&A. 1883), 36 N.J. Eq. 574; Morris v. Carter (Sup. 1884), 46 N.J. Law 260; Wilkinson v. Rutherford (Sup. 1887), 49 N.J. Law 241; Wilkinson v. Lemassina (Sup. 1888), 51 N.J. Law 61; Champion v. Hinkle (E.&A. 1888), 45 N.J. Eq. 162. In this connection it is interesting to note that in 1924 a belated and vain attack was made upon the constitutionality of the Act upon the ground that its title was inadequate. McGlathery v. Dorman (Ch. 1924), 97 N.J. Eq. 17.

[27] Algrod Realty Co. v. Bayerl (Sup. 1932), 10 N.J. Mis. R. 651. The grantor may recover from the grantee before the mortgage assumed has been paid, and before foreclosure sale. See also Holland Reform School Society v. DeLazier, 84 N.J. Eq. 442, *affirmed* (E.&A. 1915) 85 N.J. Eq. 497, and note 133 *infra*.

[28] Mershon v. Castree (Sup. 1895), 57 N.J. Law 484.

[29] Crater v. Smith (Prerog. 1886), 42 N.J. Eq. 348, *affirmed* (E.&A. 1887), 43 N.J. Eq. 636; Cranmer v. Cole (Circuit Ct. 1933), 11 N.J. Mis. R. 578.

[30] Weatherby v. Sparks (Sup. 1899), 63 N.J. Law 445.

[31] Terhune v. White (Ch. 1881), 34 N.J. Eq. 98; Field v. Thistle (Ch. 1899), 58 N.J. Eq. 339.

[32] Development B. & L. Ass'n. v. Nurock (Sup. 1931), 10 N.J. Mis. R. 23, but see Vanderbilt v. Brunton Piano Co. (E.&A. 1933), 111 N.J. Law 596 at

closure suit necessary parties defendant will preclude an action upon the bond against anyone liable thereon.[33] An obligee who has begun suit upon the bond for a deficiency cannot be forced to complete the action in order to give the defendant an opportunity to redeem.[34] The Act does not apply to suits upon bonds secured by mortgages upon premises outside of New Jersey.[35] Where, however, judgment was entered in another state upon a bond secured by a mortgage on New Jersey lands, a suit will lie to redeem if brought within six months of the date of entry of judgment.[36] The holders of overdue interest coupons attached to bonds secured by trust mortgages may sue thereon before foreclosure of the trust mortgage.[37] While the provisions of the Act may be waived, the giving of a bond with a warrant of attorney to confess judgment does not constitute such a waiver,[38] and the mortgage must be foreclosed before judgment is entered. Failure to allege in the complaint that the mortgage securing the bond sued upon has been foreclosed is not a fatal defect.[39]

The holder and the maker of the mortgage which has been cut off by the foreclosure of a prior mortgage covering the same premises are not affected by the provisions of the Act.[40]

597, "It was the right of the mortgagee, the *order in Chancery confirming sale having been duly made and subsisting,* to recover the deficiency in an action upon the bond".

[33] Deal Park Co. v. Bannard (Sup. 1924), 2 N.J. Mis. R. 194.

[34] Wolf v. Schlichting (Ch. 1932), 111 N.J. Eq. 619.

[35] Colton v. Salomon (Sup. 1901), 67 N.J. Law 73. Suit may be brought on such bonds before foreclosure of the mortgage.

[36] McGlathery v. Dorman, *supra* note 26.

[37] Fidelity Co. v. Wilkes-Barre Co. (E.&A. 1922), 98 N.J. Law 507; Levy v. Atlantic City and Shore R.R. Co. (E.&A. 1927), 103 N.J. Law 401; but see Schoeler v. Chancery Lane Corp. (Sup. 1932), 10 N.J. Mis. R. 932; and Homes v. Seashore Etc. Railway (Sup. 1894), 57 N.J. Law 16, where recovery was denied because the mortgage had not been foreclosed.

[38] Hellyer v. Baldwin (Sup. 1890), 53 N.J. Law 141; Van Aken v. Tice (Sup. 1897), 60 N.J. Law 377 at page 378. The waiver goes only to the right to have suit begun by service of process. Crosby v. Washburn (Sup. 1901), 66 N.J. Law 494. Judgment may be entered for the penalty of the bond, even though part of the deficiency has been paid. Earl v. Jenkins (Sup. 1904), 71 N.J. Law 416. See Levin v. Wenoff (Sup. 1929), 7 N.J. Mis. R. 603, for a discussion of the Act concerning the entry of judgment upon bond and warrant of attorney to confess judgment.

[39] Callan v. Bodine (Sup. 1911), 81 N.J. Law 240. *Cf.* South Broad B. & L. Ass'n. v. Brunetto (E.&A. 1934), 112 N.J. Law 79, *post* page 37.

[40] Wheeler v. Ellis (Sup. 1893), 56 N.J. Law 28; Schmidt v. Frey (E.&A. 1914), 86 N.J. Law 215; *semble,* Liss v. Ward Hamilton, Inc. (Ch. 1929),

The lien of the subsequent mortgage is completely destroyed by foreclosure of the prior mortgage. There is, therefore, no requirement that such a mortgage be foreclosed in an independent action before suit is begun on the bond which is secured.[41] Such a mortgage is foreclosed in the same proceeding brought to foreclose the prior mortgage.[42] So far as the first and second sections of the Act as amended are concerned, there is no reason why the Act could not apply.[43] It is the third section, providing for redemption, that presents an insuperable barrier.[44] Were the holder of the subsequent mortgage required to be prepared at all times to comply with an offer of redemption, he would be put to the election of paying off the prior encumbrance or losing not only the value of his security, but his right *in personam* as well. The result so reached would be doing violence to the understanding of the parties, and would render it impossible for realty owners to secure mortgages upon premises already encumbered. Specific legislation is required if the maker of the subsequent mortgage is to have benefits similar to those conferred by the Act.[45]

The grantee of mortgaged premises who accepts a deed containing a covenant of assumption of the mortgage debt is

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104 N.J. Eq. 279; Sivade v. Smith (E.&A. 1929), 104 N.J. Eq. 528; Echikson v. Zalenski (E.&A. 1930), 106 N.J. Law 508; Goldberg v. Fisher (Sup. 1933), 11 N.J. Mis. R. 657. A like result has been reached where the lien of the mortgage has been destroyed by agreement of the parties, Franklin Ass'n. v. Richman (Sup. 1900), 65 N.J. Law 526; Bower v. Bower (E.&A. 1909), 78 N.J. Law 387; and where the mortgage is a nullity because of lack of title in the mortgagors, Pruden v. Savage (Sup. 1903), 70 N.J. Law 22, and where the lien of the mortgage has been destroyed by judicial sale free and clear of the mortgage, Seigman v. Streeter (Sup. 1899), 64 N.J. Law 169.

[41] See cases cited in note 40, *supra*.

[42] Wheeler v. Ellis, *supra* note 40, at page 30.

[43] Wheeler v. Ellis, *supra* note 40, at page 30, "The language of the statute is capable of supporting either contention".

[44] Wheeler v. Ellis, *supra* note 40, at page 31 "the conclusive character of a sale in foreclosure of a prior mortgage will not be ascertained until every subsequent mortgagee necessarily made a party to the foreclosure proceedings, has had six months in which to bring suit on his bond, and, in case of any such suit, until it is ended by final judgment, and perhaps until six months afterwards. Evidently this would render the foreclosure of prior mortgages very precarious, and would enable the mortgagors to impair seriously the value of such securities by giving subsequent mortgages".

[45] Opportunity to redeem seems to be a stumbling block in the way of legislation without imposing upon the holders of prior encumbrances, the burden of notifying all persons liable on subsequent encumbrances of the pendency of the foreclosure.

also beyond the pale of the Act, if the decision in *Black Diamond Building & Loan Association v. Redlinghouse*[46] is to stand as law. The *Redlinghouse* case is based upon a statement of the Court of Errors and Appeals in *Green v. Stone*,[47] a case which decides only that the remedy in equity against an assuming grantee was in no way impaired by the Act, and that the passage of the Act in no way affected the equitable principles upon which the assuming grantee's liability is founded.[48] *Green v. Stone* is good law, based upon sound reasoning, but it unfortunately contains a *dictum* that has led to the decision in the *Redlinghouse* case,[49] which, if logically extended, should permit the entry of a deficiency decree against assuming grantees in the suit to foreclose the mortgage.[50]

The *Redlinghouse* case also cites as a binding precedent, *Holland Reformed School Society v. DeLazier*[51] and *National Bank of New Jersey v. Lefkowits*.[52] The latter case arose

[46] (Ch. 1933) 113 N.J. Eq. 1, holding that suit may be brought in equity against obligors upon the bond and assuming grantees even though more than six months have elapsed since the foreclosure sale. For the proposition that obligors upon the bond may be sued in equity together with assuming grantees even though there is an adequate remedy at law, see Uptown B. & L. Ass'n. v. Leff (Ch. 1933), 112 N.J. Eq. 543, and cases there cited.

[47] (E.&A. 1896) 54 N.J. Eq. 387 at pages 390 and 391, "All the cases agree that the language (of assumption) contained in this deed creates an obligation on the part of the grantee which the mortgagee may enforce in equity. This remedy of the mortgagee is not affected by the Acts of 1880 and 1881. The first section of the act of 1880 regulates simply the form of proceeding in foreclosure suits, and the second and third sections, as amended by the act of 1881, apply to suits at law upon bonds secured by mortgages."

[48] *Supra* note 47, at page 391, "The ancient and familiar doctrine in equity that the creditor shall have the benefit of any obligation or security given by the principal to the surety for the payment of the debt, and the remedy in a court of equity to enforce this equitable doctrine, are not impaired by this legislation. The remedy in equity is independent of the foreclosure suit."

[49] Examination of the state of case in *Green v. Stone* discloses that the bill to enforce the grantee's liability was filed within six months of the date of the foreclosure sale. The bar of the short statute of limitations was not invoked as a defense in *Green v. Stone*, as it was in the *Redlinghouse* case.

[50] There seems to have been some doubt as to whether Chancery could not enter a decree for a deficiency in the foreclosure suit even before the 1866 Act. See note 5 *supra*.

[51] (Ch. 1915) 84 N.J. Eq. 442, affirmed (E.&A. 1916) 85 N.J. Eq. 497. The bill was by a grantor against his and subsequent grantees, not by a *mortgagee* as in the *Redlinghouse* case. The provisions of the Act are not alluded to by the appellate court. The case establishes the proposition that equity will assume jurisdiction of actions cognizable in a court of law in order to avoid circuity of action. See Uptown B. & L. Ass'n. v. Leff, *supra* note 46, at page 544.

[52] (Ch. 1930) 107 N.J. Eq. 265.

under the 1907 supplement to the Mortgage Act[53] and involved no question of the applicability of the 1880 or 1881 Acts to suits in Chancery.[54] The *DeLazier* case arose upon a demurrer to a bill filed by the vendor who had paid a deficiency and was a direct challenge to the jurisdiction of the Court of Chancery to entertain a bill against successive assuming grantees. In overruling the demurrer, the Court decided that the 1880 and 1881 Acts in no way *impaired* the vendor's right to proceed in equity to enforce the liability of the assuming grantee. The decision is a corollary of *Green v. Stone,* and, like *Green v. Stone,* is sound law. Neither case is authority for the proposition that the provisions of the 1880 Act as amended are *inapplicable* to suits in Chancery against assuming grantees. Nor can either case justify the result reached in the *Redlinghouse* case, where the accident of inclusion of obligors upon the bond in the Chancery action against assuming grantees deprived the obligors of the benefit of the provisions of the Act.

The Act, in its second and third sections, makes reference to proceedings *upon the bond* for the deficiency; the entry of *judgment* for any balance of debt,[55] and redemption by any person against whom a *judgment* has been recovered.[56] Literally, the action brought by the mortgagee against the assuming grantee is not an action upon the bond, but the law courts, in construing the Act, have consistently followed a policy of liberal interpretation more often found in a court of equity. The instrument sued upon has been given a relatively minor significance. The important inquiry has been, is the action brought to enforce the *same debt* for which a bond and mortgage have been given? Where the question is answered in the affirmative, the Act has been held to apply.[57] "The form

[53] P. L. 1907, Chap. 231, page 563; 3 Comp. Stat. 3423, Sec. 51.
[54] See *post,* page 37.
[55] 3 Comp. Stat. 3421, Sec. 48.
[56] 3 Comp. Stat. 3422, Sec. 49.
[57] Where, subsequent to the bond and mortgage, a second bond with warrant of attorney to confess judgment was given, it was held that foreclosure of the mortgage was a condition precedent to entry of judgment upon the second bond. Van Aken v. Tice (Sup. 1897), 60 N.J. Law 377. Where three bonds were given at different times, all secured by the same mortgage, foreclosure of the mortgage was held to be a condition precedent to suit upon two of the

and nature of the action is immaterial if, in reality, it is a proceeding to collect the same debt for which a bond and mortgage have been given."[58] "* * * it is the identity of the debt rather than that of the instrument representing it that supplies the test whether the statute applies."[59] That the debt sought to be enforced against the assuming grantee is identical with the debt secured by the bond and mortgage is too obvious to require demonstration.

The use of the word *judgment* in the Act has been construed as definite evidence of the fact that the Legislature intended to exclude *decrees* from its operation.[60] "While there are marked distinctions between judgments of courts of law and decrees of courts of equity, nevertheless, in fact, the final decree of a court of equity is now often alluded to as its judgment, the word 'judgment' being used as synonomous, whether applied to a decree in Chancery or a judgment at law."[61] "A decree of this court is a judgment from its date."[62] The statute[63] providing that *judgments* entered of record against a decedent in his life time shall have preference, was held to include *decrees* in equity.[64] The statute[65] providing for install-

bonds. Knight v. Cape May Sand Co. (E.&A. 1912), 83 N.J. Law 597, reversing 82 N.J. Law 16. Where the defendant, during the pendency of the action to foreclose, gave a bond indemnifying the mortgagee against a deficiency in consideration of the mortgagee's withdrawing his application for a receiver, it was held such a bond is within the purview of the Act, and suit thereon is barred if brought more than six months after the foreclosure sale. Taylor v. Van Nimwegen (Sup. 1914), 86 N.J. Law 80. Where a note and bond and mortgage are given to secure the same debt, suit on the note is barred if brought more than six months after the foreclosure sale. Wildwood Title and Trust Co. v. Geisenhoner (Sup. 1933), 11 N.J. Mis. R. 871. Where, however, a subsequent bond is given with the intention that judgment be entered thereon immediately, the protection of the Act is waived. Andrus v. Burke (Ch. 1901), 61 N.J. Eq. 297. Nor does the Act apply to prevent suit upon an absolute guarantee of payment of the mortgage. Pfeiffer v. Crossley (Sup. 1918), 91 N.J. Law 433, *affirmed* (E.&A. 1919) 92 N.J. Law 638. See *infra* note 119.

[58] Wildwood Title and Trust Co. v. Geisenhoner (Sup. 1933), 11 N.J. Mis. R. 871, at page 875.

[59] Taylor v. Van Nimwegen (Sup. 1914), 86 N.J. Law 80, at page 83.

[60] Black Diamond B. & L. Ass'n. v. Redlinghouse, *supra* note 46, at page 3; National Bank of New Jersey v. Lefkowits, *supra* note 52, at page 266.

[61] Hudson Trust Co. v. Boyd (Ch. 1912), 80 N.J. Eq. 267, at page 273; see also, to the same effect, National Surety Co. v. Mulligan (E.&A. 1929), 105 N.J. Law 336, at page 343.

[62] Hazen v. Durling (Ch. 1838), 2 N.J. Eq. 133, at page 138.

[63] Rev., p. 764, Sec. 58.

[64] Second National Bank v. Blauvelt (Prerog. 1888), 44 N.J. Eq. 173.

[65] P. L. 1916, Chap. 113, page 242.

ment executions upon *judgments* has been held to authorize installment executions upon *decrees*.[66]. The Chancery Act[67] clothes the decree with many of the attributes of a judgment at law.

To include assuming grantees within the terms of the Act would be doing no violence to principles of statutory interpretation, nor would it involve the overruling of established precedent. Even granting the soundness of the decision in the *Redlinghouse* case, it by no means follows that the result attained is a proper one. The assumption of the mortgage by a grantee is a contract with the grantor simply for the grantor's indemnity, and is not regarded either in law or in equity as a contract with the mortgagee or for his benefit.[68] The right of the mortgagee is purely derivative. Where the liability of the grantor has ceased to exist, the entire basis for the assuming grantee's liability falls, and to enforce it thereafter creates the anomolous situation of giving effect to a contract to indemnify although all possibility of loss by the party indemnified has ended. The *Redlinghouse* case can be supported only on the theory that the contract of indemnity is one for the benefit of the mortgagee.[69].

By a supplement to the 1880 Act, the Legislature provided for the filing of a *lis pendens* before the commencement of suit upon the bond.[70] The act as supplemented was held constitutional in its application to suits upon obligations in force at the time of its passage,[71] the Supplement governing procedure only, without affecting the obligation of contract, or taking away a remedy for enforcing it which existed at the time the Act was passed. The Supplement is obviously one governing practise only, but its requirements are jurisdictional, and strict compliance with its terms mandatory.[72] Thus where

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[66] White v. White (Ch. 1923), 94 N.J. Eq. 278.

[67] 1 Comp. Stat. 425, Sec. 44, substantially reenacting Rev. p. 113, Sec. 56 in force in 1881.

[68] See *post,* pages 48 *ff.*

[69] See *post,* pages 47 *ff.* There is no justification for the Redlinghouse decision in its extension to obligors on the bond.

[70] P. L. 1907, Chap. 231, page 563. 3 Comp. Stat. 3423, Sec. 51.

[71] Pennsylvania Company v. Marcus (E.&A. 1916), 89 N.J. Law 633, reversing 88 N.J. Law 37.

[72] Grothenhen v. Duffield (Sup. 1927), 5 N.J. Mis. R. 677; North Hudson

the notice failed to state the name of the court in which judgment[73] would be entered, the proceedings were held nugatory, and the judgment set aside.[74] A complaint which fails to allege that the notice has been filed as required by the Supplement is not fatally defective for the non-filing is a matter of defense only.[75]. The notice must be filed before suit is begun, and, if filed afterward, and the suit discontinued, falls with the suit, and cannot stand as the basis for a later action,[76] nor has the court the power to order the filing of the notice *nunc pro tunc.*[77] Where the notice correctly states the court in which the suit is to be instituted, it is immaterial that the venue is erroneously designated.[78] When the summons antedates the filing of the notice, the Court may examine the proceedings to determine if action were instituted before the filing thereof.[79] Failure to name in the notice all parties defendants necessarily joined in the suit is a fatal defect which the court cannot cure by amendment.[80]

Following the precedent established by the cases in construing the 1880 Act as amended, the 1907 Supplement has been held not to apply to suits upon bonds secured by mortgages cut off by the foreclosure of a prior mortgage,[81] or suits in equity against assuming grantees.[82]

Bond and Mortgage Co. v. Luberto (Sup. 1931), 9 N.J. Mis. R. 637; Gerstley v. Best, 8 N.J. Mis. R. 661, *affirmed* (E.&A. 1931), 108 N.J. Law 189.

[73] On bond and warrant.

[74] Pennsylvania Co. v. Marcus, *supra* note 71.

[75] South Broad B. & L. Ass'n. v. Brunetto, note 39, *supra.*

[76] Louis Csipo, Inc. v. Nagy (E.&A. 1933), 111 N.J. Law 460.

[77] Neu v. Rogge (E.&A. 1915), 88 N.J. Law 335.

[78] Salzman v. Robinson (Sup. 1932), 10 N.J. Mis. R. 474.

[79] Mutual Savings Fund Harmonia v. Gunne (E.&A. 1933), 110 N.J. Law 41. An action at law is not "commenced" when the attorney draws and seals the summons with intent not to give it to the Sheriff until some condition precedent to the right of action has been fulfilled.

[80] Reinhardt v. Calhoun, 9 N.J. Mis. R. 914, *affirmed* (E.&A. 1932), 109 N.J. Law 580. All heirs or devisees are necessary parties to an action on a mortgage bond of the ancestor or devisor.

[81] Holzman v. Yuengling (Sup. 1928), 7 N.J. Mis. R. 20.

[82] National Bank of New Jersey v. Lefkowits, *supra* note 52. Black Diamond B. & L. Ass'n. v. Redlinghouse, *supra* note 46. See discussion *ante,* pages 32 *ff* on the soundness of these decisions. The Court, in the Lefkowits case fails to discern that the entry of judgment referred to in the Act applies only to bonds containing warrants of attorney to confess judgment. See National Bank of New Jersey v. Lefkowits, *supra,* at page 266, "The language of the statute is not that *no suit shall be commenced* until after such notice is filed, but that *no judgment shall be entered* in such suit unless the prescribed notice shall have

The second section of the Act was again amended in 1932[83] to provide that "no action shall be instituted against a party answerable upon the bond unless such party" is joined in the foreclosure suit.[84] The constitutionality of the section as amended in its application to obligations in force at the time of its passage, has not as yet been challenged.[85] It seems obvious, however, that the requirement is procedural only, and in no manner encroaches upon constitutional guarantees or prohibitions.[86] The purpose of the amendment is plain and its desirability unquestionable.

Being an amendment to a statute already made the subject of judicial construction, the Courts will no doubt hold that it has no application to suits in Chancery against assuming grantees. The soundness of such a decision, should it come, is doubtful for reasons already discussed.[87] Its provisions obviously cannot apply to suits upon bonds secured by mortgages cut off by the foreclosure of prior mortgages.[88] To hold otherwise would be to impose upon the prior mortgagee the burden of determining all those liable upon subsequent encumbrances at the risk of depriving the holders of the subsequent encumbrances of the right to proceed personally against

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been filed before the commencement of the suit". See also Prudential Ins. Co. of America v. Rosenthal (Ch. 1931), 109 N.J. Eq. 386, at page 388.

[83] P. L. 1932, Chap. 231, page 509. A prior amendment, P. L. 1915, Chap. 178, page 339, provided that upon redemption, the party redeeming shall pay "all reasonable expenses which the purchaser may have incurred in the meantime for taxes, assessments, or other prior liens, necessary repairs upon said premises, and interest on same * * *". No litigation has arisen directly involving the 1915 Amendment.

[84] The 1932 Amendment is the logical outgrowth of the rule that in the suit to foreclose the mortgage, the obligor is a proper but not a necessary party, Vreeland v. Loubat (Ch. 1838), 2 N.J. Eq. 104; Chester v. King (Ch. 1841), 2 N.J. Eq. 405; Johnes v. Outwater (Ch. 1897), 55 N.J. Eq. 398, at page 402, and the change in the law is but a throwback to prior legislation. See note 6, *supra.*

[85] The applicability of the Act seems to have been assumed without question. See Delacroix v. Stanley (Ch. 1933), 113 N.J. Eq. 121. The bond and mortgage were made in 1924. The court says (p. 122) "The defendant Stanley (the obligor upon the bond) was joined as a party defendant and is a proper party if complainant desires to pursue an action against him on his bond after the mortgage is foreclosed". See also Rose v. Jerome Harvey Development Co. (E.&A. 1933), 113 N.J. Eq. 161, and Fiedler Corporation v. Peak Realty Company (Ch. 1933), 114 N.J. Eq. 535.

[86] See notes 22, 23, and 24 *supra.*

[87] See *ante,* page 32 *ff.*

[88] See *ante,* pages 31 and 32.

those liable. Upon the authority of *Schack v. Dickenhorst,*[89] it is no doubt essential that the plaintiff allege in his complaint that the defendants to the suit were made parties to the foreclosure, since that fact must be established before the plaintiff can prevail.[90]

The universal demand for relief against mortgage foreclosures was answered by the Legislature in the 1933 Amendment to the 1880 Act.[91] Two major changes were effected. The time within which suit for deficiency must be instituted was reduced from six months to three months from the date of sale. The fair value of the mortgaged premises at the time of the sale may be applied against the deficiency. The provision enabling the obligor to show fair value has been declared unconstitutional by the Court of Errors and Appeals[92] in its application to obligations in existence at the time of its passage. There is a clear impairment of the obligation of contract in violation of the prohibitions contained in both the Federal[93] and State[94] constitutions. The court refused to be swayed by the popular demand for upholding the Act, and disregarded the adverse criticism leveled against Justice Parker for his action in striking the answer in the *Brunton* case. It could reach no other conclusion without doing the utmost violence to every known and accepted principle of constitutional law, and without, for all practical purposes, reading the constitution out of existence.

Whether the Court will follow the *Brunton* case when called upon to determine the constitutionality of the requirement that suit be instituted within three months instead of six months is problematical. In construing the 1880 Act as amended in 1881, the six months limitation was regarded as

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[89] (E.&A. 1923) 99 N.J. Law 120, at page 123, "* * * under elementary rules the existence of every fact upon which his right to recover depends must be specifically averred in his complaint".

[90] But see South Broad B. & L. Ass'n. v. Brunetto, *supra* note 75.

[91] P. L. 1933, Chap. 82.

[92] Vanderbilt v. Brunton Piano Co. (E.&A. 1933), 111 N.J. Law 596. See also Stewart v. Schachter (Sup. 1933), 11 N.J. Mis. R. 948. Queen Anne Park Holding Co. v. Van Saders (Sup. 1933), 11 N.J. Mis. R. 949. Aimone v. Brenner, 11 N.J. Mis. R. 951. (Sup. 1933) American Homes B. & L. Ass'n. v. Angelillis, 11 N.J. Mis. R. 952.

[93] Article 1, Section 10, Clause I.

[94] Article 4, Section 7, Par. 3.

so inseparable from the main purpose of the Act (in itself unconstitutional in its application to antecedent obligations) that it could not stand of itself, and fell with the faulty parts of the Act.[95] The main purpose of the Act, that of regulating suits for deficiencies, is not unconstitutional as applied to obligations incurred after its passage. The three months provision is clearly separable from that part of the Act found faulty in the *Brunton* case. The only question to determine is whether the time within which suit may be brought upon an obligation is so far a part of the obligation or of the remedy for enforcing it that it cannot be diminished as to contracts already in force, without involving a violation of the constitutional guarantees. The Federal Constitution contains no prohibition against impairing the remedy given for the enforcement of contracts. The rule in the Federal Courts seems to be that statutes of limitation may be modified by shortening the time prescribed, at the will of the legislature, provided a reasonable time is left for the commencement of an action before the law takes effect.[96] The 1933 Amendment, by its terms, would seem to bar an action accrued more than three months and less than six months before its passage, thereby rendering it unconstitutional.[97] The State constitution goes further than the Federal constitution in that it prohibits legislation depriving a party of any remedy for enforcing a contract which existed when the contract was made.[98] Reducing the period within which suit may be brought constitutes depriving a party of his remedy only when no reasonable period is left for the commencement of the action before the law takes effect. "The legislature may make laws which incidentally affect the pursuit of remedies for enforcing contracts; as, for instance * * * prescribing periods for the limitation of actions within

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[95] Morris v. Carter (Sup. 1884), 46 N.J. Law 260.

[96] Brent v. Bank of Washington, 10 Pet. 617; Sturges v. Crowninshield, 4 Wheat. 207; Jackson v. Lamphire, 3 Pet. 290; McGahey v. Virginia, 135 U. S. 705; Terry v. Anderson, 95 U.S. 633; see also Bronson v. Kinzie, 1 How. 311; McCracken v. Hayward, 2 How. 608.

[97] John v. Waterson, 17 Wall 509. See also, Mills v. Scott, 99 U. S. 27; Vance v. Vance, 108 U. S. 514; Wheeler v. Jackson, 137 U. S. 245; Gilfillan v. Union Canal Co., 109 U. S. 404.

[98] Article 4, Section 7, Par. 3.

a reasonable time."[99]

Even if the constitutionality of the three months provision were upheld, the 1933 Amendment should be repealed on the ground that it has failed of the purpose for which it was enacted. The realty owner who has just witnessed the sale of his premises on foreclosure, will derive little consolation from the fact that the mortgagee must sue him for a deficiency within three months. Nor would it be of immediate aid were he lawfully able to have the fair value of the premises applied in reduction of the deficiency. The need can be met only by a moratorium[100] and the amendment is not moratory in any respect.[101] No stays are enacted, possibly because stay laws seem to be prohibited by the constitutional guarantee against laws depriving a person of a remedy for enforcing a contract which existed at the time the contract was made.[102] Stay laws generally, however, do not *deprive* a party of a remedy; they simply *suspend* the remedy for the period named.

Legislation which ignores the rights of assuming grantees and the problem presented by mortgages securing notes[103] is incomplete and paves the way for future problems and difficulties. The practise of lending money upon bond and mortgage will disappear[104], except where made mandatory by statute.[105] Those factors and considerations which impelled the Legislature to enact the 1880 Mortgage Act and which caused subsequent legislatures to enact the various amendments and supplements to that Act, have the same force and pressure of public policy behind them when applied to makers of notes accompanying mortgages, and assuming grantees. Additional legislation is inevitable. The earlier it comes, the fewer will be the problems to solve, and the injustices suffered.

The 1933 Amendment should be repealed for the further

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[99] See Newark Savings Institution v. Forman, *supra* note 22, at page 441. Rader v. Southeasterly District (Sup. 1873), 36 N.J. Law 273, at page 281.

[100] See A. H. Feller, *Moratory Legislation,* 46 HARV. L. REV. 1061.

[101] See Vanderbilt v. Brunton Piano Co. *supra* note 92, at pages 602 and 603.

[102] Const. N. J., Article 4, Section 7, Par. 3.

[103] See note 15 *supra.*

[104] The New Jersey division of the Home Owners Loan Corporation has not adopted the practise, and is lending its funds only upon mortgages securing notes.

[105] Building and Loan Associations are so restricted. P. L. 1925, Chap. 65, Sec. 26.

reason that its continuance in force has been rendered superfluous by the trend of recent decisions in the Court of Chancery. The Court, no doubt feeling that the decision of Justice Parker in striking the answer in the *Brunton* case, would be upheld by the Court of Errors and Appeals, and realizing that the broad and elastic powers of the Chancellor should be moulded to contemporary exigencies, intervened to give the relief intended by the Legislature to be conferred by the Act. A hint of the "new deal" for mortgagors is found in *Fifth Avenue Bank of New York v. Compson,*[106] where, before the issue of a writ of *fieri facias,* the Court refused a stay of execution and sale for one year. It was pointed out that the equity of the defendant in the mortgaged premises was negligible, and that the property, being located near the seashore, would be sold at a time of year most propitious for such sales. The Court refused to "become an instrument of speculation on future property values,"[107] but points out that if the premises did not bring a satisfactory price, objections to the confirmation of sale might be interposed by any party in interest. Another instance of the Court's refusal to intervene before sale, is seen in *United Building & Loan Association v. Neuman,*[108] where it was held that no upset price would be fixed in advance of the foreclosure sale, there being no presumption that a deficiency will result from the foreclosure sale, or if it does, that a deficiency judgment will be sought. The Court refuses to administer its extraordinary remedy in anticipation of events which may only possibly necessitate the exercise of its jurisdiction.

Invoking the ancient maxim that "He who seeks equity

[106] (Ch. 1933) 113 N.J. Eq. 152, at page 154. "I entertain no doubt but that this court may control its own judicial proceedings and processes in such manner as to prevent an injustice under circumstances demanding the exercise of its inherent power. The present financial emergency, worldwide in its scope and affecting all nations and peoples, cannot be viewed as anything less than catastrophic. This may necessitate new applications of legal and equitable rules and concepts requiring the courts to render "their judgments with more fidelity to economic facts, with more general utility" and in partial or complete disregard of rules "conceived in the past, upon the basis of totally different postulates and world conditions." See also *Mortgage Relief During The Depression,* 47 HARV. L. REV. 299.

[107] *Supra* note 106, at pages 154 and 155.

[108] (Ch. 1933) 113 N.J. Eq. 244. See also Kotler v. John Hancock & C. Ins. Co. (Ch. 1933), 113 N.J. Eq. 544, and Mt. Ridge B & L Ass'n v. M. & W. Holding Co. (Ch. 1933) 115 N.J.Eq. 52.

must do equity," the Court, in *Baader v. Mascellino,*[109] applied the principles expressed in the *Compson* case.[110] Here the complainant obtained a judgment against a mortgagor for a deficiency, and filed a bill to set aside conveyances made by the mortgagor as fraudulent. The Court agreed to retain the bill only upon the condition that the complainant credit the fair market value of the mortgaged premises against the amount of the deficiency. The decision is a product of the times, so that established precedent loses its binding force;[111] and, when social and economic conditions warrant, will no longer serve as an expression of the law.[112]

The issue was squarely presented to the Court in *Federal Title and Mortgage Guaranty Company v. Lowenstein,*[113] the logical, but not the chronological predecessor of the *Baader* case. Here the mortgagor filed objections to the confirmation of the foreclosure sale upon the grounds that the sum realized was "grossly insufficient and unconscionably inadequate". There was no irregularity in the sale, but affidavits filed by the defendant in support of his objections indicated a complete lack of competitive bidding not only with respect to the property involved in that case, but also with respect to practically every property sold by the Sheriff on the date of the sale. It was admitted that the failure of the mortgagor to protect himself at the foreclosure sale, and the lack of competitive bidding, were due to present economic conditions as a result of which the real estate market is stagnant and mortgage money is not available. Although recognizing the well-established rule that confirmation of a judicial sale will not be refused because of mere inadequacy of price,[114] the Court

[109] (Ch. 1933) 113 N.J. Eq. 189.

[110] See note 106 *supra.*

[111] Bohde v. Lawless (Ch. 1881), 33 N.J. Eq. 412, which denied the same relief sought in the *Baader* case.

[112] Baader v. Mascellino, *supra* note 109, at page 194. "What is agreeable to equity and good conscience varies from time to time with changing social and economic conditions."

[113] (Ch. 1933) 113 N.J. Eq. 200.

[114] Morrisse v. Inglis (E.&A. 1889) 46 N.J. Eq. 306; Bethlehem Iron Company v. Philadelphia and Sea Shore Railway Company (Ch. 1892), 49 N.J. Eq. 356; Hoffman v. Godfrey (E.&A. 1912), 79 N.J. Eq. 617; Hurley v. Potash (E.&A. 1921), 93 N.J. Eq. 167; Guarantee Trust Company v. Fitzgerald Hotel and Development Corp. (E.&A. 1925), 97 N.J. Eq. 277; Hecht v. Hoogmoed (E.&A. 1932), 111 N.J. Eq. 331.

refused to confirm except upon terms, holding that confirmation would be withheld unless and until the complainant in the foreclosure action, who was also the purchaser at the foreclosure sale, stipulated that the fair value of the mortgaged premises be credited on the decree, and deficiency suit prosecuted only for the balance. The court finds justification for its action in two sources: first, in the established precedents holding that slight circumstances in addition to mere inadequacy of price will suffice to move the conscience of the court to refuse confirmation,[115] and second, in the inherent power of the Court of Chancery to order a sale of mortgaged premises and to control its process directed to that end.[116] The court takes judicial notice of the fact of the depression and holds that it is a sufficient circumstance, in addition to inadequacy of price, to cause the court to refuse a confirmation, despite the fact that it involves the overriding of the strong and well-founded public interest in favor of finality of judicial sales.[117]

The flexibility of the rule as applied by the Court of Chancery is evidenced in the cases following the *Lowenstein*

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[115] Seaman v. Riggins (Ch. 1839), 2 N.J. Eq. 214, defendant was misdirected to the place of sale; Howell v. Hester (Ch. 1843), 4 N.J. Eq. 266, the petitioner's agent mistook the date of sale; Workingmen's Mutual Building & Loan Ass'n. v. McGillick, 28 Atl. Rep. 468, the bidder arrived ten minutes late after having attended twelve prior adjournments; Wetzler v. Schaumann (Ch. 1873), 24 N.J. Eq. 60, the owner was misinformed as to the terms of the sale; Rea's Executors v. Wheeler (Ch. 1876), 27 N.J. Eq. 292, one of the parties was too ill to attend the sale; Banta v. Brown (Ch. 1880), 32 N.J. Eq. 41, a misunderstanding as to the sale arose between the solicitors for the parties; Dunlap v. Chenoweth (Ch. 1918), 90 N.J. Eq. 85, defendant bidder was ill; New Jersey National Bank & Trust Company v. Savemore Realty Co. (E.&A. 1931), 107 N.J. Eq. 478, an interested bidder arrived five minutes too late because of a street car delay.

[116] Franklin Capital Corporation v. Heinochowitz (E.&A. 1933), 114 N.J. Eq. 86. See also Federal Title & Mortgage Guaranty Co. v. Lowenstein, *supra* note 113, at page 207; Vanderbilt v. Brunton Piano Co., *supra* note 92, at page 601, "It is within the broad powers of the Court of Chancery to withhold confirmation of the sale if to confirm would work gross inequity". The Lowenstein case has received the implied approval of the Court of Errors and Appeals. See Vanderbilt v. Brunton Piano Co., *supra* note 92, at page 602.

[117] Federal Title and Mortgage Guaranty Co. v. Lowenstein, *supra* note 113, at page 206, "There is no longer any competitive bidding at foreclosure sales and the reason for the rule (against disturbing bids at foreclosure sales) has temporarily ceased to exist. The reason for the rule having disappeared, the rule itself should fall or its application be suspended until its potency as a factor in producing competitive bidding is restored."

case. In *Lurie v. J. J. Hockenjos Company,*[118] a bill by a mortgagor to restrain an action at law for a deficiency was dismissed upon the mortgagee's offer to credit the fair value of the mortgaged premises against the deficiency. The attack upon the sale was collateral, and not brought in the same proceedings as the mortgage foreclosure. The bill, however, also prayed that the sale and the order confirming it be set aside. In *Fruzynski v. Phillips,*[119] a surety upon the bond petitioned the court, in the foreclosure suit, to open and vacate the sale and order confirming and restrain an action at law unless and until the fair value of the mortgaged premises were credited against the bond. The Court properly held that the protection of the *Lowenstein* case will be extended to include a surety upon the bond, as well as the obligor, and granted the relief prayed on the ground that there was but one debt to be satisfied. Again, in *Better Plan Building & Loan Association v. Holden,*[120] the court had under consideration a collateral attack upon the foreclosure sale.[121] The court retained the answer to avoid circuity of action,[122] and held that an assuming grantee against whom an action was brought for a deficiency, has just as much of an equitable right as the mortgagor to have the fair value of the premises which the mortgagee has acquired, credited against the deficiency. And where the mortgage foreclosed is junior in lien to a prior subsisting mortgage, the fair value of the mortgaged premises will be credited against the deficiency, less the amount of the prior encumbrance to which the premises were subject at the time

[118] (Ch. 1933) 113 N.J. Eq. 504.

[119] (Ch. 1933) 114 N.J. Eq. 23. This case was decided by the Vice-Chancellor who decided the Redlinghouse case (*supra* note 46), and the identity of the surety's obligation with that of the principal is here recognized. While the manner in which the relationship of principal and surety was created differed, the legal implications are the same and identity of the obligation follows as an *a fortiori* conclusion. See discussion *ante,* page 34.

[120] (Ch. 1933) 114 N.J. Eq. 537.

[121] For the power of a court of equity to go behind a judgment at law, see Minzenheimer v. Doolittle (E.&A. 1899), 60 N.J. Eq. 394; reversing 56 N.J. Eq. 206.

[122] Better Plan B. & L. Ass'n. v. Holden, *supra* note 120, at page 541, "To compel the defendants to institute another proceeding in this court (in the former foreclosure suit) against the present complainant, * * * would result in no benefit to anyone * * * Defendants should not be compelled to go out and around and enter again by another door".

of the sale.[123] In no case has relief been asked where the premises have been purchased at the sale by one not a mortgagee. What can be done to relieve the mortgagor or assuming grantee where the premises are purchased by a stranger to the transaction at a price less than the fair value, has not been decided.

The mechanics of determining fair value have given the court some concern. Where the parties agree, there is, of course, no difficulty, but in the ordinary dispute between mortgagor and mortgagee, the former's optimistic appraisal can in no way be reconciled with the latter's pessimism. The practise is to refer the matter to a master, and, upon such reference, the master's report of such value will be sustained unless palpably wrong, and the average of the irreconcilable views of a number of experts will not be accepted as a rule of thumb for fixing fair value.[124]

The advantages of the manner in which the Court of Chancery has responded to the emergency over the provisions of the 1933 Amendment, are apparent. Freedom to analyze the facts presented in each particular case and to weigh equities on both sides, is set over against the rigidity and adamantine requirements of the Amendment. The relief as administered by the Court of Chancery embraces assuming grantees[125] and the makers of mortgages cut off by the foreclosure of prior mortgages,[126] and is flexible enough to include the makers of mortgages securing notes, whereas the Act, if construed in the light of existing decisions,[127] would exclude such mortgage debtors from its intended benefit. The Chancery rule will be suspended as soon as the necessity for its continued operation falls; the Amendment is unlimited as to time, and makes no

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[123] Fidelity Realty Co. v. Fidelity Corp. (Ch. 1933), 113 N.J. Eq. 356.

[124] Chasey v. Broadway Holding Co. (Ch. 1933), 114 N.J. Eq. 74. An additional method of settling the issue is incidentally suggested in Better Plan B. & L. Ass'n. v. Holden, *supra*, at page 542, where the court states that a deficiency for the full amount might be permitted if the mortgagee offered a deed to the premises to the assuming grantee. Such proceeding is, of course, fraught with danger unless the full deficiency is clearly collectible. See Clevenger v. Fechenbach (Ch. 1933), 115 N.J. Eq. 8.

[125] See note 120, *supra*.

[126] See note 123, *supra*.

[127] See notes 15, 16 and 17, *supra*.

distinction between a case where the mortgagee is the purchaser at foreclosure sale, and one where a stranger buys the mortgaged premises, a palpable injustice to the mortgagee.[128]

The problems presented by the assumption of mortgage debts in deeds accepted by grantees, have engaged the attention of the Courts apart from the question of the applicability of the 1880 Act. There are two theories under which a grantee, who assumes and agrees to pay a mortgage on property made by his grantor, may be liable to the mortgagee. In *Lawrence v. Fox*,[129] it was held that a promise by one, in consideration of money lent him, to pay it to the lender's creditor, may be enforced by the latter. This has led many of our courts to the conclusion that a promise made by a grantee who assumes payment of the mortgage, is one for the benefit of the mortgagee and he may therefore sue the grantee directly on that promise.

If the mortgagee is entitled to recover against the grantee upon his covenant of assumption of the mortgage debt on that theory, the understanding between the grantor and the grantee at the time of the sale must be that they should have intended that the grantee's promise be for the benefit of the mortgagee. An intention so imputed is contrary to fact. Such a covenant is generally made for the benefit of the grantor to indemnify him against loss and is its primary purpose. The grantor and grantee are not seeking to increase the security of the mortgagee. Each party is seeking only his own interest. The vendor, entirely careless and indifferent of the interests of the mortgagee, seeks only indemnity, and security that he will never have to pay the mortgage after he has parted with the title. The vendee promises as little as possible to get the property. Any other interpretation would do violence to the course of business and our experience of human nature.

Since the mortgagee gives no consideration for the obligation undertaken by the grantee which he obtains by such a covenant of assumption, it is difficult to see how the grantee is liable on the theory of *Lawrence v. Fox*, [130] as he has made

[128] See Vanderbilt v. Brunton Piano Co. *supra* note 92, at pages 598, *ff.*
[129] Lawrence v. Fox (1859), 20 N.Y. 268.
[130] Lawrence v. Fox has been cited as authority for the proposition that a

no promise for the benefit of a third party.[131]

A more rational theory of the liability of the grantee who assumes and agrees to pay the mortgage made by his grantor, is that of the doctrine of equitable subrogation. The purchaser of land, encumbered by a mortgage, who assumes and agrees to pay the mortgage debt, becomes, as between himself and his grantor, the principal debtor and the liability of the grantor, as between the parties, is that of a surety.[132] Upon a default, an action will lie by the grantor against the assuming grantee notwithstanding that the grantor has not been called upon to pay the mortgage debt.[133] In equity, a creditor may have the benefit of all collateral obligations for the payment of the debt which a person standing in the relationship

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grantee who assumes payment of the mortgage, is directly liable to the mortgagee on the ground that the mortgagee is the third party beneficiary of the contract between the grantor and the grantee. Actually, however, the court in Lawrence v. Fox considered the nature of the assuming grantee's liability to the mortgagee, and held that Mellon v. Whipple (Mass.) 1 Gray, 317, where the mortgagee was denied recovery in an action at law against an assuming grantee, has no analogy "in the case before us, nor do the reasons for the decision bear in any degree upon the question we are now considering".

[131] Yet that is the legal theory upon which his liability is based in Colorado (Cobb v. Fishel, 1900, 15 Colo. App. 384, 62 Pac. 625), Illinois (Dean v. Walker, 1882, 107 Ill. 540, 47 Am. Rep. 467; Bay v. Williams, 1884, 112 Ill. 91, 1 N. E. 340), Iowa (Marble Sav. Bank v. Mesarvey, 1897, 101 Iowa 285, 70 N. W. 198), Missouri (Crone v. Stinde, 1900, 156 Mo. 262, 55 S. W. 863, 56 S. W. 907; Llewellyn v. Butler, 1915, 186 Mo. App. 525, 172 S. W. 413), Nebraska (McGregor v. Eastern Building & Loan Ass'n. 1904, 5 Neb. 563, 99 N. W. 509), Pennsylvania (Merriman v. Moore, 1829, 90 Pa. 78), Tennessee (Title Guaranty & Trust Co. v. Bushnell, 1921, Tenn., 228 S. W. 699).

[132] Crowell v. Hospital of St. Barnabas (E.&A. 1876), 27 N.J. Eq. 650, *affirming Id.* 152; Cubberly v. Yager (Ch. 1886) 42 N.J. Eq. 289; Green v. Stone, note 47 *supra;* Binns v. Baumgartner (Ch. 1929) 105 N.J. Eq. 58; Howell v. Baker (Ch. 1930) 106 N.J. Eq. 434; Hunt v. Gorenberg (Sup. 1930) 9 N.J. Mis. R. 463; Reeves v. Cordes (Ch. 1931) 108 N.J. Eq. 469.

[133] In a deed *inter partes* where an estate is conveyed to the grantee, and the estate conveyed is accepted by him, although only signed and sealed by the grantor, it is the deed of both parties and the grantee is bound by the covenants therein contained on his part and can be held in an action on the covenant for the breach. Bolles v. Beach (E.&A. 1850) 22 N.J. Law 680; Finley v. Simpson (Sup. 1850) 22 N.J. Law 311; Earle v. Mayor Etc. of New Brunswick (Sup. 1875) 38 N.J. Law 47; Vreeland v. Van Blarcom (E.&A. 1882) 35 N.J. Eq. 530; Sparkman v. Gove (Sup. 1882) 44 N.J. Law 252; Huyler's Executors v. Atwood (Ch. 1876) 26 N.J. Eq. 504, *affirmed* 28 N.J. Eq. 275; Green v. Stone, *supra* note 47; Howell v. Baker, *supra* note 132, at page 438; Algrod Realty Co. v. Bayerl (Sup. 1932) 10 N.J. Mis. R. 651; Dieckman v. Walser (E.&A. 1933) 114 N.J. Eq. 382. This is an exception to the general rule that persons are not liable on contracts not signed by them; Harrison v. Vreeland (Sup. 1876) 38 N.J. Law 366.

of a surety for others, holds for his indemnity.[134] Under the theory of subrogation, the right of a mortgagee to enforce the payment of the mortgage debt against the grantee of the mortgagor, does not rest upon any contract of the grantee with the mortgagee, or upon any contract between the grantee and the mortgagor for the mortgagee's benefit. The basis for the recovery by the mortgagee of a deficiency against an assuming grantee in a direct proceeding, is derived through the mortgagor's right against his grantee[135] to hold him upon his covenant of assumption and not by virtue of any original equity residing in the mortgagee.[136] It is in the extension of this principle that decrees for deficiency have been made against subsequent purchasers, who have assumed the payment of the mortgage debt and thereby become principal debtors as between themselves and their grantors. If the grantor is not liable for the payment of the mortgage debt, the inclusion of the covenant of assumption in the deed is surplusage and meaningless and the grantor cannot enforce it. Since the mortgagee's right to proceed directly against the grantee depends upon the grantor's right of action, if the grantor cannot recover against the grantee, the mortgagee cannot recover against him.[137] Similarly, where the premises have passed through successive grantees and any grantee in the chain of title has failed to assume payment of the mortgage debt, and subsequent

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[134] Green v. Stone, *supra* note 47; Heid v. Vreeland (Ch. 1879) 30 N.J. Eq. 591; Binns v. Baumgartner, *supra* note 132.

[135] Vreeland v. Van Blarcom, note 133 *supra;* Algrod Realty Co. v. Bayerl (Sup. 1932) 10 N.J. Mis. R. 651; Bolles v. Beach, *supra* note 133; Clott v. Jordan (Sup. 1929) 10 N.J. Mis. R. 733; Crowell v. Hospital of St. Barnabas, *supra* note 132; Cubberly v. Yager, *supra* note 132; Green v. Stone, *supra* note 47; Hunt v. Gorenberg, *supra* note 132; Ketcham v. Brooks (Ch. 1876) 27 N.J. Eq. 347; Sparkman v. Gove, *supra* note 133; Stevenson v. Black (Ch. 1831) 1 N.J. Eq. 338; Thayer ads. Torrey (Sup. 1875) 37 N.J. Law 339; Tichenor v. Dodd (Ch. 1844), 4 N.J. Eq. 454; Wilson v. King (Ch. 1872) 23 N.J. Eq. 150; Wise v. Fuller (Ch. 1878) 29 N.J. Eq. 257; Youngs v. Public School Trustees (E.&A. 1879) 31 N.J. Eq. 290; Arnaud v. Grigg (Ch. 1878) 29 N.J. Eq. 482.

[136] DeGrauw v. Mechan (Ch. 1891) 48 N.J. Eq. 219; Eakin v. Shultz (Ch. 1900) 61 N.J. Eq. 156; Green v. Stone, *supra* note 47; Heid v. Vreeland, *supra* note 134; Klemmer v. Kerns (E.&A. 1906) 71 N.J. Eq. 297; Norwood v. DeHart (Ch. 1879) 30 N.J. Eq. 412; Teitz v. Meano (E.&A. 1930), 107 N.J. Eq. 210.

[137] Eakin v. Shultz, *supra* note 136; Green v. Stone, *supra* note 47; Klemmer v. Kerns, *supra* note 136; Norwood v. DeHart, *supra* note 136; Arnaud v. Grigg, *supra* note 135; Wise v. Fuller, *supra* note 135.

grantees have so assumed, the covenants contained in the subsequent deeds are not available to the mortgagee.[138]

As distinguished from an express assumption of the mortgage debt, the grantee may be liable to his grantor upon an implied assumption. Such a situation will arise where a purchaser of mortgaged premises deducts or retains out of the purchase price, as fixed and agreed upon, the amount of the mortgage debt. Equity will there raise or impose upon his conscience an obligation to indemnify his grantor, if the latter himself be personally liable for the payment of the mortgage debt, and this although the premises were conveyed *subject to the mortgage.*[139] The equitable nature of the implied assumption has caused some confusion where the grantor has attempted to enforce this obligation of the grantee in an action at law. *Loudenslager v. Woodbury Heights Land Co.*[140] is responsible to some degree for this confusion. Here there was a suit at law by a grantor against his grantee for the recovery of the amount of the mortgage debt. The court sustained a demurrer to the declaration because it counted upon an express assumption of the grantee to pay the mortgage debt, whereas the deed attached to the declaration merely showed that the premises were conveyed subject to mortgages which were taken as part of the consideration and contained no language of assumption. The court states,[141] "The declaration now demurred to counts upon a contract to assume the mortgage and to pay it. It appearing from the deed that there was no such contract, the declaration is faulty." The *Loudenslager* case does not establish the proposition that no action at law will lie by a grantor against his grantee to enforce the implied assumption, since it decides only a question of pleading on an express assumption which was, in fact, absent from the case.

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[138] Eakin v. Shultz, *supra* note 136; Wise v. Fuller, *supra* note 135; Klemmer v. Kerns, *supra* note 136; Norwood v. DeHart, *supra* note 136. *Semble,* Garfinkel v. Vinik (Ch. 1933), 115 N.J. Eq. 42.

[139] Fiedler Corp. v. Peak Realty Co. (Ch. 1933) 114 N.J.Eq. 535; Thayer ads. Torrey, *supra* note 135; Tichenor v. Dodd, *supra* note 135; Heid v. Vreeland, *supra* note 134; Friedman v. Zuckerman (Ch. 1929) 104 N.J. Eq. 322; Reeves v. Cordes, *supra* note 132; Dieckman v. Walser, *supra* note 133; Stevenson v. Black, *supra* note 135.

[140] (Sup. 1900) 64 N.J. Law 405.

[141] At page 407.

That such a suit will lie, at law, by the grantor and against the grantee, has been decided in *Clott v. Jordan.*[142]

The rule in evidence that parol agreements cannot be shown to vary or contradict the terms of a written instrument,[143] and the further rule that the law presumes that a deed made and accepted in fulfillment of an executory contract fully expresses the ultimate intent of the parties as to so much of the contract as it purports to execute[144] have resulted in further confusion where the grantor has sought to enforce the obligation of his grantee to indemnify him against the payment of the mortgage debt. The law seemed clear that parol evidence could be introduced to show an express assumption of the mortgage debt, or facts from which an implied assumption would be raised, and that independent and collateral agreements contained in a contract for the sale of lands are not merged in the deed[145] until the decision of the Court of Errors and Appeals in *Smith v. Colonial Woodworking Co.*[146] That case decided that an express assumption can be enforced only when it is contained in the deed, and that an implied assumption would be raised only where the deed showed upon its face that the mortgages were taken as part of the consideration, and that parol evidence of the assumption can be introduced only when it is sought to reform the deed. Following the decision in *Smith v. Colonial Woodworking Co.,* a grantor was denied recovery in an action at law by him against his grantee in *Latt v. Schwehm,*[147] brought upon an express assumption contained in the contract, but omitted from the deed, which stated that the conveyance was subject to the mortgage in question. The facts showed that the amount of the mortgage had been credited against the purchase price, thereby raising an implied assumption. The conclusion of the court was that if it had been the intent of

[142] *Supra* note 135.
[143] Naumberg v. Young (Sup. 1882) 44 N.J. Law 331.
[144] Long v. Hartwell (Sup. 1870) 34 N.J. Law 116.
[145] Ireland v. Penn Motors Corp. (Ch. 1926) 100 N.J. Eq. 166; Janitscheck v. Melbro Realty Co. (E.&A. 1931) 107 N.J. Law 450; Long v. Hartwell, *supra* note 144; Merchants & Traders, etc. v. Mercer Realty Co. (E.&A. 1923) 99 N.J. Law 442.
[146] (E.&A. 1932) 110 N.J. Eq. 418.
[147] (Sup. 1932) 10 N.J. Mis. R. 1050.

the parties that the grantee assume payment of the mortgage, the agreement had been voluntarily released before the delivery and acceptance of the deed. The theory of the plaintiff's action was based upon an express assumption, and not upon an assumption implied in law. The case was affirmed[148] upon the ground that the evidence supported the court below in finding that the grantee had been released from his express covenant of assumption, citing *Dieckman v. Walser,*[149] which overruled *Smith v. Colonial Woodworking Co.* insofar as it departed from the long established rule which permits of inquiry into the fact of payment of the consideration and its corollary, that a mortgage assumption agreement may be established by parol. Before the decision in *Dieckman v. Walser,* the Court of Errors and Appeals refused to pass upon the question whether a court of law will raise an obligation against a grantee to indemnify a grantor against the latter's liability for the mortgage debt if, by the terms of the sale, the mortgage money was to be taken as a part of the consideration.[150] The difficulty of proof having been removed by *Dieckman v. Walser,* it would seem that *Clott v. Jordan*[151] correctly states the law.

As in the case of an express assumption, the grantor and grantee stand in the relation to each other of surety and principal, respectively. Applying the rule that in equity, a creditor may have the benefit of all collateral obligations for the payment of the debt which a person standing in the relationship of a surety for others, holds for his indemnity, leads to the inevitable conclusion that the mortgagee may have the benefit of the implied assumption of the grantee. The contrary, however, seems to be the law as expressed in *Freidman v. Zuckerman*[152] which holds that where the grantee of mortgaged property retains enough of the purchase-money to pay the mortgage, he is under obligation to indemnify the mortgagor against the mortgage debt, but that he is not liable to the mortgagee for the deficiency remaining after foreclosure

[148] Latt v. Schwehm, 111 N.J. Law 493.
[149] *Supra* note 133.
[150] Malcolm v. Lavinson (E.&A. 1933) 110 N.J. Law 63.
[151] *Supra* note 135.
[152] See note 139, *supra.*

of the mortgage where there was no "legal" assumption of the mortgage debt by him. In deciding the *Zuckerman* case, the Court relied on Justice Garrison's opinion in *Woodbury Heights Land Co. v. Loudenslager,*[153] for such restriction of the direct liability of the grantee to the mortgagee. The case cited, however, did not decide that. It merely touched upon an appeal from the Court of Chancery's dismissal of a petition which sought to correct a decree, holding[154] "all that is decided upon this appeal is that the execution should be stayed, that the levy stand as security to the complainant, and that the case presented by the petition is not stale."[155]

Since the doctrine of suretyship has apparently been lifted bodily and applied to the relations of mortgagor, grantee, and mortgagee, it would, perhaps, be supererogatory to ask whether the relations presented disclose a true case of suretyship. Generally, if the creditor extends the time for payment of the debt to the principal without the consent of the surety, the latter is released from his liability. It is true that at first sight there is no very evident equity in discharging one who suffers no damage. However, the rule as to discharge by giving time is merely part of the broader rule that any variation of the surety's risk which may injure him to an extent that cannot at the time be ascertained, discharges him.[156]

In the field of mortgages, there has been some confusion in the application of that doctrine of suretyship. In *Firemen's Insurance Co. v. Wilkinson,*[157] C executed a bond, payable in one year, to the complainant for $1,000 secured by a first mortgage on his property. He then sold the property to D who, as part of the consideration, assumed the payment of the mortgage. D made a second mortgage which was later foreclosed.

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[153] (E.&A. 1899) 60 N.J. Eq. 403.

[154] At page 411.

[155] That case was preceded by other controversies between the same parties, which may have confused the Court in the Zuckerman case. Originally an action to recover profits realized by the president of the company alleged to have been made by him in the purchase of lands for the company while he was president, Woodbury Heights Land Co. v. Loudenslager, (Ch. 1896) 55 N.J. Eq. 78; it was appealed Loudenslager v. Woodbury Heights Land Co. (E.&A. 1897) 56 N.J. Eq. 411, later resulting in a modification on such appeal Loudenslager v. Woodbury Heights Land Co. (E.&A. 1899), 58 N.J. Eq. 556.

[156] 21 R. C. L. Sec. 66, Principal and Surety, page 1018.

[157] (E.&A. 1882) 35 N.J. Eq. 160.

W became the purchaser of the property at the sheriff's sale under that foreclosure and thereupon made his "collateral" bond to the complainant for $1,000 due in one year. W then conveyed the property to L who assumed the payment of the mortgage; L conveyed it to R on similar conditions and R conveyed it to S who also assumed payment of the mortgage. In addition to this, S executed his "collateral" bond to the complainant for $1,000 due in one year. The bill was for foreclosure of the mortgage and for a decree of deficiency against C, D, W, L, R and S. W was the only answering defendant. His defense was that S, having given his bond to the complainant which was payable in one year, and there being an unbroken line of assuming grantees from W to S, S became the principal debtor and W the surety. Because the complainant had extended time to S without his consent, he was discharged. The Court of Chancery held that W had been discharged in equity by the action of the insurance company and for that reason it was not entitled to a decree against him for any deficiency. On appeal, that decision was unanimously reversed, the Court of Errors and Appeals acknowledging the proposition that when W sold the property and his grantee assumed the payment of the mortgage, such grantee became the primary debtor and W stood, in equity, as his surety; further, that when the complainant, with notice thereof, extended the time for the payment of the mortgage debt to S, such extension would, upon well-known equitable principles, set him free from the bond of his suretyship. It rested its decision, however, squarely on the proposition that the taking of the "collateral" bond from S did not amount to an extension of the mortgage by the insurance company, holding, that since it was "the usual course" for the insurance company to take "collateral" bonds from purchasers of property on which it held a mortgage lien, the *"natural inference"* was that the encumbrances would be unenforced indefinitely and that was probably the reason why S gave the bond without exacting a definite agreement from the insurance company; an agreement "which such company would not have been likely to enter into as its obvious effect would have been to discharge the respondent (W) from his responsibility and otherwise to

confuse and impair the security already in its hands". In other words, although W may be a surety for the payment of his principal's debt, the insurance company did not release him by extending the time of payment to S for the obvious effect of that would have been to discharge W from his responsibility.[158]

It is to be noted that the Courts, in discussing the relationship between the grantor and the grantee who assumes payment of the mortgage debt, are unanimous in stating that, *as between themselves,* the parties are respectively surety and principal.[159] The mortgagee, not being a party to the transaction, is not bound at law to respect the relationship,[160] and may hold the obligor on the bond as the principal, despite his alienation of the property to a grantee who has assumed payment of the mortgage. If such an obligor is faced with a suit at law for the deficiency, he must choose Chancery as the forum in which his purely equitable defense may be considered.[161] He must show that the mortgagee has in some way accepted the grantee as the principal debtor. The mortgagee does not accept the grantee as the principal merely by accepting interest due on the mortgage, but does so when he makes some alteration in the mortgage contract with the grantee. If he makes such alteration without the consent of the original mortgagor, the latter is, in equity, released from his liability.[162] It is a coincidence that the same act which places the mortgagor in the position of a surety so far as the mortgagee is concerned, at the same time releases him from liability because he is a surety. A basis for avoiding such a paradox is in holding that

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[158] This case has frequently been incorrectly cited since the date of its decision, as authority for the statement that an extension of time by the mortgagee to the assuming grantee, discharges the grantor from liability. That was *dictum,* since the decision was based, queerly enough, on an almost contrary hypotheses.

[159] See note 132, *supra.*

[160] Hunt v. Gorenberg, *supra*; see also North American B. & L. Ass'n. v. Weber (Sup. 1933) not yet reported.

[161] Anthony v. Fritts (Sup. 1883) 45 N.J. Law 1; Grier v. Flitcraft (Ch. 1898) 57 N.J. Eq. 556; Hunt v. Gorenberg, *supra* note 132; Reeves v. Cordes, *supra* note 132.

[162] Grier v. Flitcraft, *supra* note 161; Haskell v. Burdette (Ch. 1882) 35 N.J. Eq. 31; Paulin v. Kaighn (Sup. 1859) 27 N.J. Law 503; Palmer v. White (Sup. 1900) 65 N.J. Law 69; Stephany v. More (Sup. 1912) 82 N.J. Law 186; Reeves v. Cordes, *supra* note 132; Shute v. Taylor (E.&A. 1897) 61 N.J. Law 256.

the mortgagee's dealings with the grantee constitute his recognition of the relationship of principal and surety as having antedated the act of alteration which released the mortgagor.[163] That the alteration of the contract is a sufficient recognition by the mortgagee of the assuming grantee as the principal debtor, is seen in *Firemen's Insurance Company v. Wilkinson,* where the Court of Errors and Appeals said that the mortgagee would not have been likely to extend the time for the payment of the mortgage to the assuming grantee "as its obvious effect would have been to discharge the respondent (obligor) from his responsibility" and "set him free from the bond of his suretyship."[164] More recently this precise question was presented to the Court in *Gorenberg v. Hunt,*[165] wherein a mortgagor sought to restrain an action at law[166] against him for a deficiency by a bill in Chancery raising the equitable defense, not available to him in the law court, that the extension of time for the payment of the debt given by the mortgagee to the assuming grantee without his consent, released him as a surety. The Court dismissed the bill, holding that because the mortgagee had no notice that the grantee had assumed payment of the mortgage when the extension was given, the mortgagor was not discharged. It stated that when a mortgagor sells his property, he assumes many risks, including deterioration of the property, accumulation of taxes, failure to insure; and he also takes the risk that the term of the mortgage may be extended. The court based its decision on the fact that the creditor had no knowledge of the relationship of principal and surety between grantor and grantee, despite the fact that the mortgagee "entered into an agreement with the new owners whereby she extended the time of payment of the mortgage money for three years and whereby they agreed to pay the same". Factually, knowledge of the relation between grantor and grantee is immaterial. In entering into a valid extension agreement with the grantee, and in altogether ignoring the

[163] The ruling is sound, whatever the basis for it may be. See 41 A.L.R. page 277 *et seq.*

[164] 35 N.J. Eq. 160 at pages 175 and 179.

[165] (E.&A. 1930) 107 N.J. Eq. 582.

[166] Hunt v. Gorenberg, *supra* note 132.

grantor, the mortgagee thereby demonstrates his recognition and acceptance of the grantee as principal debtor.

While the Court of Chancery must consider the equitable nature of the relationship of the parties, the mortgagor cannot insist that these personal rights be adjudicated in the foreclosure suit[167] to the consequent delay of the mortgagee,[168] for the foreclosure of a mortgage is a proceeding *in rem*.[169] If his defense is pleaded as a counterclaim in the suit, equity will permit the foreclosure to take its usual course, but will retain the counterclaim pending the decree of foreclosure and sale,[170] if there is to be a suit for any deficiency. If the mortgagee proceeds directly against the grantee by a bill in Chancery,[171] his rights, being derived from and limited by the rights of the mortgagor to which he has been subrogated, are fixed at the time he files his bill. To support the claim of a mortgagee "two conditions must exist at the time he files his bill: first, he must at that time have a right to collect the deficiency from the mortgagor, and second, the mortgagor must have the right to reimburse himself by enforcing against the subsequent purchaser, the covenant which he had given for the payment of the mortgage debt,"[172] so that where, by the terms of a collateral agreement between the grantor and the grantee, the latter could not be held liable to the former, the mortgagee could not enforce the contract of assumption in the deed.[173] "In other words, being a stranger to the contract of the purchaser with the mortgagor, and to the consideration whereon it was founded, it will be competent for those who were parties to it to rescind and extinguish it at their pleasure; and after such recission and extinguishment, the contract becomes utterly incapable of enforcement."[174] The rule seems to be that the

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[167] Usbe Building & Loan Assn. v. Ocean Pier Realty Co. (Ch. 1933) 112 N.J. Eq. 580.

[168] Mann v. Bugbee (Ch. 1933) 113 N.J. Eq. 434; Fiedler v. Peak Realty Co., *supra* note 139; Usbe B. & L. Ass'n. v. Ocean Pier Realty Co., *supra* note 167; Vanderbilt v. S. W. Holding Company (Ch. 1933) 112 N.J. Eq. 584.

[169] Andrews v. Stelle (E.&A. 1871) 22 N.J. Eq. 478.

[170] Usbe B. & L. Ass'n. v. Ocean Pier Realty Co., *supra* note 167.

[171] If no recovery is sought against him, the mortgagor is not a necessary party to such a bill; Mann v. Bugbee, *supra* note 168. See note 46 *supra*.

[172] Biddle v. Pugh (Ch. 1900) 59 N.J. Eq. 480, at page 483.

[173] Klemmer v. Kerns, *supra* note 136.

[174] Crowell v. Hospital of St. Barnabas, *supra* note 132, at page 657.

grantor and grantee retain control of the covenant of assumption up to the time that suit is brought by the mortgagee against the grantee to enforce it.[175] A voluntary reconveyance to the grantor of the mortgaged premises by the grantee who assumed payment of the mortgage debt, will apparently operate to release the grantee from liability.[176] A release executed by the grantor-mortgagor, after he became hopelessly insolvent, and after the commencement of the suit to foreclose the mortgage, was held to be fraudulent and inoperative to bar the action of the mortgagee against the assuming grantee.[177] The court in *Field v. Thistle,* makes the broad statement that after notice of an action brought to foreclose a mortgage, all releases of the mortgage by grantors to persons who have assumed it upon purchasing, are void, even though the practise does not permit a judgment for deficiency in the foreclosure suit. In *Youngs v. Trustees of Public Schools,*[178] releases were executed with a view to discharge three grantees of the mortgaged premises from personal liability for the mortgage debt, and were given for nominal consideration in contemplation of foreclosure. It was held that these facts standing alone, did not make out a case of fraud. It was further held that a party who had incurred responsibility for the payment of the mortgage debt, either as a mortgagor, or by subsequent assumption of the liability, and has conveyed the mortgaged premises taking a covenant from his grantee for the payment of the mortgage debt, would have no right in case of his insolvency, to divest himself by a voluntary release of the covenant of indemnity against his liability for the mortgage debt.[179] If part of

[175] Green v. Stone, *supra* note 47, at page 390, "* * * but if at the time suit is brought by him (the mortgagee), the obligation of the grantee to pay the mortgage debt is in existance undischarged, the remedy against the grantee is complete". See also DeGrauw v. Mechan, *supra* note 136, at page 223; Youngs v. Trustees of Public Schools, *supra* note 135.

[176] DeGrauw v. Mechan, *supra* note 136; Crowell v. Hospital of St. Barnabas, note 132, *supra.*

[177] Field v. Thistle, 58 N.J. Eq. 339, *affirmed* in 60 N.J. Eq. 444.

[178] See note 135 *supra.*

[179] See Cherry v. Orth and Coan Inc., 110 N.J. Eq. 175; evidence examined and held not to constitute a valid release of the grantee's liability. See also O'Neill v. Clark (Ch. 1881), 33 N.J. Eq. 444, where there was a *bona fide* release of an assumption of a mortgage, verbally agreed upon before suit brought to foreclose the mortgage, but not executed until after the bill was filed. The court, having found that the release was executed and the consideration paid

the mortgaged premises has been released from the lien of the mortgage by the mortgagee, the amount of the grantee's liability is proportionately reduced by the value of the lands released.[180] If the mortgagee releases or covenants not to sue the mortgagor by a settlement effected between them, such a voluntary release relieves the grantee from liability.[181] If the mortgagor has been adjudicated a bankrupt, he is under no liability to pay the mortgage debt,[182] and cannot require his grantee to indemnify him; consequently, the mortgagee is in no better position,[183] although that question has not yet been decided in New Jersey. Similarly, it would seem that recovery should be denied the mortgagee upon the bankruptcy of the grantee where the latter had named only his grantor in the schedules. Where the mortgagee pursues the grantee outside New Jersey, the question of whether the suit must be at law or in equity is governed by *lex fori*.[184]

If the mortgagor has conveyed the equity of redemption to a grantee who has not assumed payment of the mortgage, either expressly or impliedly, the grantee is not liable, either at law or in equity for the payment of any deficiency.[185] The grantor, on an extension of time for the payment of the mortgage debt by agreement of the mortgagee and such grantee, may have some relief in equity from a deficiency suit at law[186] to the extent of the value of the property at the time the debt was due on the theory that the land is the primary fund for the payment of the debt.[187]

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without knowledge of the existence of the suit, held that the covenant of assumption had been discharged.

[180] Mann v. Bugbee, *supra* note 168.

[181] Feitlinger v. Heller (E.&A. 1932) 112 N.J. Eq. 209.

[182] City Hall B. & L. Ass'n. v. Star Corp. (E.&A. 1933) 110 N.J. Law 570; Vanderbilt v. Lauer (E.&A. 1934) 112 N. J. Law — . See also Vanderbilt, Trustee v. S. W. Holding Company, note 168, *supra*.

[183] Bloch v. Budish (Mass.) 180 N. E. 729.

[184] Willard v. Wood, 135 U. S. 309; Marks v. Kindel 41 Fed. (2nd) 584; N. Y. Life Ins. Co. v. Aitkin, 125 N. Y. 660, 26 N. E. 732; Home v. Selling, 179 Pac. 261.

[185] Tichenor v. Dodd, note 135, *supra*.

[186] Reeves v. Cordes, note 132, *supra*.

[187] Tichenor v. Dodd; Reeves v. Cordes, *supra*. See (1933) 33 COLUMBIA LAW REV., page 368.