fied, that court will remit the case with directions to allow the amendment on terms if it is justified.[29]

MORTAGES—NECESSITY OF JOINING TENANTS IN FORECLOSURE PROCEEDINGS.—By judicial construction of the statutory enactment[1] governing proceedings in suits to foreclose mortgages on real property, a condition precedent to an action on the bond for a deficiency arising out of a sale of the mortgaged premises is the complete exhaustion of the property and all interests therein.[2]

From this construction has developed the rule that the failure to make a tenant of the mortgaged premises a party defendant to a foreclosure suit, and thus bar his interest, constitutes a valid defense to a suit by the mortgagee, against the mortgagor on the bond secured by the foreclosed mortgage, for a deficiency arising from the foreclosure and sale of the mortgaged premises.[3]

In *Guardian Life Ins. Co. v. Lowenthal*,[4] and *American-Italian B & L Ass'n v. Liotta*,[5] strict applications of the rule were approved, but *dicta* in the *Liotta case* and subsequent decisions[6] indicate a trend toward liberalization and modification of the general principle.

---

29. McCarthy v. Mullen, 82 N.J.L. 379, 82 Atl. 933 (E. & A., 1912).

1. REV. ST. 1937, 2:65-1, 2 *et seq.* (P. L. 1880, ch. 170).

2. Deal Park Co. v. Bannard, 2 N.J.Misc. 194, (Sup. Ct. 1924); see EISENBERG & SPICER, *Mortgage Deficiencies In New Jersey* (1934), 3 MERCER BEASLEY LAW REVIEW 27; Federal Title and Mortgage Guaranty Co. v. Lowenstein, 113 N.J.Eq. 200, 166 Atl. 538 (Ch. 1933); Mahaffey v. Evans, 115 N.J.Eq. 434, 171 Atl. 315 (Ch. 1934); American-Italian B & L Ass'n v. Liotta, 117 N.J.L. 467, 189 Atl. 118 (E. & A. 1936), 108 A.L.R. 1346.

3. Ellveaay Newspaper & Co. Ass'n v. Wagner Market Co., 110 N.J.L. 577, 166 Atl. 332 (Sup. Ct. 1933), *aff'd* in 112 N.J.L. 88, 169 Atl. 692 (E. & A. 1933); see (1935) 1 UNIV. OF NEWARK LAW REVIEW 76 (note 16) and cases therein cited; American-Italian B & L Ass'n v. Liotta, *supra*, note 2. *Cf.* Strong v. Smith, 68 N.J.Eq. 686, 60 Atl. 66 (E. & A. 1905); Walgreen Co. v. Moore, 116 N.J.Eq. 348, 173 Atl. 687 (Ch. 1934); Polish Home B & L v. Burinefsky, 119 N.J.L. 1, 194 Atl. 140 (E. & A. 1937).

4. 13 N.J.Misc. 849, 189 Atl. 897 (Sup. Ct. 1935).

5. *Supra*, note 2.

6. Harvester B & L v. Elbaum, 119 N.J.L. 437, 196 Atl. 709 (E. & A. 1937), *rev'd* in 121 N.J.L. 515 (E. & A. 1939) for procedural reasons; Stratford B & L

In *Harvester B & L v. Elbaum*,[7] the mortgagee in a suit for the deficiency was permitted to allege in his pleadings and prove at the trial that such failure had not lessened the vendible value of the mortgaged premises by deterring bidders at the time of the sale; and such proof having been satisfactorily made, it was held that the mortgagee did exhaust his security in compliance with the statute.[8] On the facts of the case the holding is sound. The reason for the statutory requirement that the mortgagee first completely exhaust the security is a practical rather than a theoretical one and exhibits a legislative desire that the mortgagee be first required to "squeeze his security dry" by securing the very best possible price for it at the sheriff's sale. The theory of the decisions announcing the rule under consideration is that the failure to make a tenant a party may prevent the property from bringing the best possible price at the sale.[9] It logically follows that if the best price *was* obtained, as in the *Harvester case,* the reason for the rule has ceased to exist.

Similarly, it has been held that the rule does not apply except when the deficiency is calculated from the foreclosure sale, and thus if the debtor has obtained from the court credit for the full value of the property he will not be permitted to assert the defense of non-

---

Ass'n v. Wagner, 122 N.J.Eq. 452, 194 Atl. 440 (E. & A. 1937); Fidelity Union Trust Co. v. Chausmer, 120 N.J.L. 208, 198 Atl. 828 (E. & A. 1938); Guaranty Trust Co. v. Hoffman, 16 N J.Misc. 340, 199 Atl. 781 (Circ. Ct. 1938).

7. *Supra,* note 6. The facts of the case show that at the foreclosure sale of the premises an announcement was publically made that said premises would be sold free of all tenancies and that possession would be delivered with the sheriff's deed; and the plaintiff's reply to the defendant's answer stated that before confirmation of the sale and delivery of the deed, the premises were entirely vacant and untenanted. *Cf.* Hurley v. McCleary, 121 N.J.L. 299 (E. & A. 1938).

8. The statute is satisfied if the mortgagee " * * * can show that the apparent encumbrance which remained upon the premises at the time of the sale, unaffected by the foreclosure decree, was of such a nature that it did not prejudice the sale by deterring bidders nor lessen the vendible value of the mortgaged premises by depriving a purchaser of his right of possession under his reed or otherwise." WELLS, J., in 119 N.J.L., at p. 441.

9. Deal Park Co. v. Bannard, *supra,* note 2, Chodosh v. Schlesinger, 14 N.J.Misc. 599, 186 Atl. 716 (Circ. Ct. 1936). See also the Liotta Case, *supra,* note 2, at 117 N.J.L., p. 472.

joinder of tenants.[10] Likewise, if the mortgagor obtains from the Court of Chancery, credit on the decree for the fair market value and fails at that time to make reference to the neglect of the mortgagee to join tenants, he is equitably estopped from asserting his defense in the suit at law on the bond.[11] To assert such an estoppel, it must appear that the mortgagor, in the equity action, made a representation or concealed material facts inconsistent with the facts relied on by him in his defense at law.[12]

The modified rule, as deduced from the recent opinions, is that the failure of the mortgagee to join existing tenants in a suit to foreclose is a valid defense to a subsequent deficiency action at law, unless it can be shown that such failure did not lessen the vendible value of the mortgaged premises, or that the bonded obligor has been precluded by having been credited with the fair market value of the premises, or equitably estopped by his actions in the Chancery proceedings.[13]

The reasons for the modifications of the strict general rule are understandable only in the light of the historical development of judicial decisions and statutory enactments.

Under the earlier statutory law pertaining to mortgages on real property,[14] commonly referred to as the Budd-Deacon Act, the remedy of the mortgagee to regain his loan was threefold. He could not only foreclose on the land secured, but at the same time he could obtain a deficiency judgment against the mortgagor and the grantee of the mortgagor who had assumed the mortgaged indebtedness.[15]

---

10. Strafford B & L Ass'n v. Wagner, *supra*, note 6.

11. Fidelity Union Trust Co. v. Chausmer, *supra*, note 6.

12. Guaranty Trust Co. v. Hoffman, *supra*, note 6.

13. In Strong v. Smith, 68 N.J.Eq. 686, 60 Atl. 66 (E. & A. 1905), it was recognized that ordinarily the mortgagors lessee should be made a party to the foreclosure suit, but that where it appeared that the lessee had full knowledge of the foreclosure proceedings and concealed his interest therein, a writ of assistance would issue against him at the instance of one who purchased a decree for the foreclosure of the mortgage. This procedure by the state courts was sustained by the United States Supreme Court in 203 U.S. 584, 27 Sup. Ct. 782, 51 L. ed. 328, *sub. nom.* Lamar v. Spaulding.

14. P.L. 1880, ch. 170, p. 255.

15. Klapworth v. Dressler, 13 N.J.Eq. 62, 78 Am. Dec. 69 (Ch. 1860), where it was held that a purchaser of land, who assumes in his deed to pay off the

One can very well understand that where a mortgage is regarded as a conveyance, and not as a mere security for a debt, there is no objection to allowing a mortgagee to proceed at the same time to foreclose his mortgage and bring an action at law to recover judgment on the debt. The object of the foreclosure suit in such a situation is, not primarily for the recovery of the indebtedness secured by the mortgage, but to fix and declare the legal rights of the mortgagee in and to the mortgaged premises by cutting off or barring the mortgagor's equity of redemption after his failure to pay the indebtedness.[16] Under the New Jersey theory of the mortgage relationship, the mortgage is not considered as a conveyance but merely as a lien in payment of a mortgage debt until default on the due date.[17]

Today, the statutory proceedings require that before a mortgagee may sue at law for his debt, he must first proceed in equity, for a foreclosure of his security,[18] under the doctrine that the land is the primary fund for the satisfaction of the mortgage debt.

The doctrine further recognizes that the essential purpose of the mortgagor's personal obligation on the bond, is not a direct undertaking to pay the mortgage debt, but is to indemnify the mortgagee against the contingency that the land may not bring enough to satisfy the indebtedness.

These general principles, embodied in the *Vail Act,* have been found to be just and equitable in the majority of cases presented thereunder and in actual experience. However, the soundness of the strict general rule under discussion can be questioned today, in the light of present legal, economic and social trends.[19]

First, it is open to question whether a leasehold is such an interest in the mortgaged premises as to come within the operation of the statute. The leasing is wholly between the mortgagor and the lessee;[20]

---

bond and mortgage of his grantor, to which such land is subject, thereby becomes a surety in respect to the mortgage debt.

16. Young v. Vail, 222 Pac. 912, 34 A.L.R. 980 (N. Mex. 1924).

17. Sanderson v. Price, 21 N.J.L. 637 (E. & A. 1846).

18. Rev. St. 1937, 2:65-1, 2 *et. seq.* (P.L. 1880, ch. 170), commonly known as the Vail Act.

19. See brief of *Amicus Curiae* in the American-Italian B & L Ass'n v. Liotta, *supra,* note 2.

20. Tyler v. Hamilton, 62 Fed. 187 (Circ. Ct. Oregon 1894).

the mortgagee has no privity with the lessee;[21] the lessee while in possession of the mortgaged premises has no seisin thereof; his possession is the seisin of the lessor who has the legal title.[22] The tenants in possession have no lien upon the land, are not interested in the claim secured or in the estate mortgaged, and have no interest in the proceeds of the sale.[23]

This being so, it would logically follow that the foreclosure sale resulting in a decree in favor of the foreclosing mortgagee would operate to evict them by title paramount.[24]

Moreover, it has been held in New Jersey that upon default, but before the sale, the mortgagee has an immediate right to possession and may eject the mortgagor or those who hold under him.[25] It would seem, *a fortiori,* that after a judicial sale and decree for possession, the mortgagee's right to eject the tenants would be greater. Can it, therefore, be truthfully said that the failure to join a tenant is a non-compliance with the statute?

The problem of the courts to afford adequate relief to a foreclosing mortgagee who has failed to join tenants as necessary parties to the suit has been a formal, rather than a substantial difficulty, which the courts have hurdled by invoking the aid of a statutory enactment and a procedural regulation.

The Legislature, looking at the situation from a practical standpoint, has provided a remedy to the mortgagee, but which is limited, however, to leaseholds of not less than two years or for life. By operation of a statutory enactment, where a person has a recordable instru-

---

21. Western Union Teleg. Co. v. Ann Arbor R. Co., 90 Fed. 379, 33 C.C.A. 113, 61 U.S.App. 741 (Circ. Ct. A. 6th Dist. Michigan 1898), *rev'd* on other grounds in 178 U.S. 239, 20 Sup. Ct. 867, 44 L. Ed. 1052 (1900); Morlan v. Pittsburgh, C. & St. L. R. Co., 32 Fed. 878 (C.C.A., Ohio 1887), appeal dismissed in 154 U.S. 510, 14 Sup. Ct. Rep. 1149, 38 L. Ed. 1079 (1893).

22. *Supra,* note 20; Bennett v. U. S. Land Title and Legacy Co., 16 Ariz. 138, 141 Pac. 717 (1914).

23. McDermott v. Burke, 6 Cal. 580 (1860).

24. See cases cited *supra,* note 20.

25. Del-New Co. v. James, 111 N.J.L. 157, 167 Atl. 747 (Sup. Ct. 1933); Steadfast B & L Ass'n v. Ploski, 12 N.J.Misc. 96, 171 Atl. 147 (Cir. Ct. 1934).

ment,[26] which is not recorded, the party holding it is deemed to have been made a party to the foreclosure proceeding just as if he appeared in the suit.[27] So abrupt has been the force of this enactment, that some jurists have chosen to circumvent the legislative short-cut and have labored to grant relief to the mortgagee through some manner consistent with ancient legal precepts.[28] Such effort is not commendable.

This type of legislation clearly expresses the intent and desire of the law making body to encourage the borrowing of money on mortgages and to facilitate the recovery of the loan through legal barriers.

The courts, also seeking a practical interpretation of the existing laws, have extended the scope of the legislative enactment through the aid of *writs of assistance.* In the early case of *Blauvelt v. Smith,*[29] it was held that a writ of assistance can only issue against persons who are parties to a suit or who came into possession under a defendant after its commencement. The subsequent case of *Strong v. Smith,*[30]

26. See Rev. St. 46:16-1 making "leases for not less than 2 years or life" recordable.

27. Sec. 58, Chancery Act; Rev. St. 1937, 2:29-27, 1 C.S. 1910, p. 432. This section, however, applies only to a case where a person holds an instrument which, in its then condition he can lawfully place on record, but which he neglects to or refuses to record; *Cf.* Rev. St. 1937, 46:22-1, Conveyance Act, making such leases "void and of no effect against * * * subsequent bona fide purchasers and mortgagees for valuable consideration not having notice thereof * * * whose mortgage shall have been first duly recorded or registered." Also *Cf.* Polish Home V & L Ass'n v. Burinefsky, 119 N.J.L. 1, 194 Atl. 140 (E. & A. 1937), which held that a monthly tenant whose tenancy has been created prior to the filing of a *lis pendens* in a mortgage foreclosure, is a necessary party, for a month to month tenancy is not a series of successive monthly transactions but one transaction terminable by the giving notice of either of the parties. Also see Chodosh v. Schlesinger, *supra,* note 9, where it was held that a holdover tenant from year to year, in open and notorious possession of the mortgaged premises does not have a recordable lease and must be joined in the foreclosure proceedings.

28. See Strong v. Smith, *supra,* note 13; Stratford B & L Ass'n v. Wagner, *supra,* note 6.

29. 22 N.J.Eq. 31 (Ch. 1871).

30. *Supra,* note 13. It was held in the case that the purchaser at the foreclosure sale was entitled to a writ of assistance to recover possession against a subordinate lessee of the mortgagor, even though such lessee was not made a party to the foreclosure proceedings. It is to be observed in this case that the lease was an unrecorded one for five years.

however, supplemented this rule by allowing the writ to issue against any party whose right of possession is clearly subordinate to that of the purchaser. This, in effect increased the scope of the writ, permitting it to be issued not only as against a person in possession who has entered pending the foreclosure suit under any of the parties, but also as against a person who has entered pending the suit as a mere trespasser, and such persons who have subjected their title and right of possession to the operation of Section 58 of the Chancery Act.[31]

The function of a writ of assistance is to put into actual possession of the property a person who under a decree of the court is entitled thereto. It has also been recognized that the exercise of this power rests in the sound discretion of the court.[32] The efficacy of this discretion is clearly shown in the very recent case of the *Fidelity Union Trust Co. v. Gerber Bros. Realty Co.*,[33] where a writ of assistance was issued against tenants not made parties to the proceedings merely because the order for possession had recited that the final decree absolutely debarred and foreclosed them. Their eviction under the writ was held to satisfy the rule that the security must be exhausted.

Thus, we see that the relief to be granted the mortgagee rests not upon inelastic laws but within the discretion of the tribunal, that is, according to the rules of reason and justice.

A logical analysis of the legal problem forces the conclusion that if a tenant holds his tenancy under a mortgagor or mortgagee in possession,[34] and derives his rights from such mortgagor or mortgagee he has no greater rights than that mortgagor or mortgagee and the foreclosure decree thereby terminates his rights and he becomes subject to ejectment by a writ of assistance.

The plethora of conflicting litigation over this problem has created the necessity of molding the law to meet the social and economic exigencies of the present times.

It has been held that the failure to join a tenant as a necessary party in the foreclosure suit, as a result of which his interest remains

31. *Supra*, note 13.
32. Schenk v. Conover, 13 N.J.Eq. 220, 78 Am. Dec. 95 (Ch. 1860).
33. 123 N.J.Eq. 511, 199 Atl. 7 (Ch. 1938).
34. See cases cited in 41 C.J. 623, sec. 596.

unaffected, is a deterrent factor in the bidding of the prospective purchasers at the sheriff's sale, and is therefore a non-compliance with the statute which requires the mortgagee to "squeeze his security dry."[35]

This argument is indisputable where the lease is a disadvantageous one and thereby burdens the purchaser with a cloud upon his title. But where the lease is advantageous, it is conceivable that in the present day the failure to terminate such a lease might enhance the sale price of the mortgaged premises. Nevertheless, under the theory that both an advantageous or disadvantageous lease may deter a certain class of bidders who are interested in the property for some particular or special purpose, requiring immediate possession,[36] the mortgagee is under a duty to join "all persons having an interest" in the property.[37]

The mortgagee is thus compelled to cut off all advantageous leaseholds, thereby decreasing the value of his security or subjecting himself to further litigation, wherein the jury must determine as an issue of fact that the failure to join the tenant did or did not deter public bidding.[38] Surely, the Legislature had not foreseen that their enactments would receive such an application, destructive of their primary intent.

A further legislative problem presents itself respecting tenancies which arise during the pendency of a foreclosure. It has already been shown by reference to *Strong v. Smith, supra,* that possessory rights arising after the filing of the bill and under any of the parties to the foreclosure must yield and do yield to the purchaser's right of possession flowing from his purchase at the foreclosure sale. This rule is not only sound in point of law, but is indispensable economically. It is a common occurrence for one holding a mortgage on a large office building or a large apartment house or hotel to take possession of the security and collect the rents pending foreclosure. During the pendency of the foreclosure, leases expire or tenants vacate. New lettings become necessary, not alone for the benefit of the mortgagee but also for the

---

35. American-Italian B & L v. Liotta, 117 N.J.L. 467, 189 Atl. 118 (E. & A. 1936); Gale v. Carter, 154 Ill. App. 478 (1910).

36. *Ibidem.*

37. Harvester B & L v. Elbaum, 119 N.J.L. 437, 196 Atl. 709 (E. & A. 1937), *rev'd* on procedural grounds in 121 N.J.L. 515 (E. & A. 1939).

38. *Ibidem.*

advantage of the obligor and the owner of the equity. Every dollar of rent taken in on such a new letting increases the ultimate surplus or reduces the ultimate deficiency. When a vacancy occurs, the foreclosing mortgagee is put to the necessity of electing between permitting the vacancy to continue or making the letting and then bringing in the new tenant by amendment to his bill and issuing new process. Where the tenancies are many and constantly shifting, the mortgagee would have to amend his bill every time a new letting is made. This might go on indeterminably, there never arriving a time when the mortgagee could safely take his final decree with all the *then existing* occupants before the court. There might even be new lettings between the date of entry and the final decree and the date of sale. Is it not sound to say that when a person acquires a right of possession or occupancy under one of the parties to a pending foreclosure suit, such tenant enters subject to the cutting off of his possession by a writ of assistance, if, and when, the foreclosure suit proceeds to the point of decree, *fi, fa.,* sale and confirmation and sheriff's deed? Does not the tenant taking a letting from the owner *during the pendency of the suit* take it subject to the risk that his possession will be so cut off? Similarly, does not a person letting from a mortgagee in possession, pending foreclosure, take that letting subject to the risk of the possession being cut off if the mortgagee's estate later merges in a decree of foreclosure and that decree is carried forward to a point of sale and confirmation? Both of these *queries* merit an affirmative answer and, in either situation, the tenancy and the possession created during the foreclosure cannot and should not survive the sale.

The solution to the aforementioned problems lies in proposed legislation. It is urged that the mortgagee should have the election of joining tenants according to his sound business judgment. This power of election, however, should be subject to challenge by the mortgagor upon being served with notice of the foreclosure suit. When the obligor is served, the *duty* should be incumbent upon him to have all the encumbrances, which he desires, joined in the suit. In this manner, by placing the burden upon the obligor, where it rightfully belongs, rather than on the foreclosing mortgagee, the problem of the non-joinder of tenants as a bar to a deficiency suit on the bond would cease to exist.

Lenders are all the more ready to lend with real estate as security

if they are assured of a ready realization thereon, free from unnecessary judicial process. This proposed legislation not only makes for uniformity; it promotes brevity and certainty in mortgage instruments, simplicity of procedure and validity of title. It enables the mortgagee to realize readily on his security; yet it protects the mortgagor against forfeiture.