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Notice of Argument.
(Filed September 21, 1937.)

New Jersey Court of Errors and Appeals

HARVESTER BUILDING & LOAN
ASSOCIATION OF NEWARK, N. J.,
a New Jersey corporation,
Plaintiff-Appellant,

vs.

HANA ELBAUM and
SIMON ELBAUM,
Defendants-Appellees.

On Appeal from
Essex County
Circuit Court.
Sat Below:
Porter, C. C. J.

10

*To: Simon M. Seley, Esq., Attorney
for Defendants-Appellees:*

20

TAKE NOTICE that the argument of the appeal in the above stated cause will be brought on at the next term of the Court of Errors and Appeals, to be held at the State House, at Trenton, New Jersey, on the 19th day of October, 1937, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard.

LEBER & RUBACK,
Attorneys for and of Counsel
with Plaintiff-Appellant.

30

Dated, September 1, 1937.

Notation—Transcript from Circuit Court filed with Clerk of Court of Errors and Appeals on Sept. 24, 1937.

40

Notice of Appeal and Grounds of Appeal.

(Filed August 17, 1937.)

ESSEX COUNTY CIRCUIT COURT.

10	HARVESTER BUILDING & LOAN ASSOCIATION OF NEWARK, N. J., a New Jersey corporation, Plaintiff, <i>vs.</i> HANA ELBAUM and SIMON ELBAUM, Defendants.	}	Action at Law.
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20 *To: Simon M. Seley, Esq., Attorney
of Defendants:*

TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the following order and judgment, viz.:

30 1. The order entered in this cause, dated June 4, 1937 and filed June 17, 1937, striking out the plaintiff's reply and further ordering that judgment final be entered in favor of the defendants and against the plaintiff, together with costs to be taxed.

2. The final judgment in this action entered on June 17, 1937, in favor of the defendants and against the plaintiff, together with costs taxed at \$33.95.

Said appeal is based on the following grounds:

40 (1) The Circuit Court erred in holding that the plaintiff had in its antecedent fore-

Notice of Appeal and Grounds of Appeal.

closure suit failed to exhaust the mortgage security in that a tenant in the property was not made a party to that foreclosure suit.

(2) The Circuit Court erred in holding that the tenant, Louis Brown, was a necessary party to the plaintiff's antecedent foreclosure action, and that in omitting to join the said Louis Brown as a party to said action the plaintiff had failed to exhaust its mortgage security and could not, therefore, maintain the within deficiency action against the defendant-obligors. 10

(3) The Circuit Court erred in holding that the facts alleged in the plaintiff's reply did not meet and overcome the defendants' answer, notwithstanding that the facts presented by said reply were not alone uncontroverted but were conceded by the defendants to be true. 20

(4) The Circuit Court erred in adjudging that the plaintiff's reply is frivolous and without legal sufficiency.

(5) The Circuit Court erred in rendering summary judgment final in favor of the defendants and against the plaintiff. 30

(6) The Circuit Court erred in not denying the defendants' motion to strike the plaintiff's reply and to enter summary judgment.

(7) The Circuit Court erred in denying to the plaintiff a trial on the merits of the facts presented by its reply. 40

Notice of Appeal and Grounds of Appeal.

(8) The said summary judgment was entered without due process.

Dated, August 17, 1937.

10

LEBER & RUBACK,
Attorneys for and of Counsel
with Plaintiff-Appellant.

Endorsement on Notice of Appeal and Grounds
of Appeal:

Service of the within Notice of Appeal and
Grounds of Appeal is hereby acknowledged this
17th day of August, 1937.

20

SIMON M. SELEY,
Attorney for Defendants.

30

40

Summons.

(Filed June 19, 1936.)

*The State of New Jersey—ss: To Hana Elbaum
and Simon Elbaum:*

YOU ARE SUMMONED to answer the
annexed complaint of Harvester Build- 10
ing and Loan Association of Newark,
(L. S.) N. J., a New Jersey corporation, in an
action at law, in the Essex County Cir-
cuit Court.

AND TAKE NOTICE, that unless you file your
answer to said complaint with the Clerk of the
said Essex County Circuit Court, at Newark,
within twenty days after service upon you of this
writ and the annexed complaint, the plaintiff may 20
proceed in the suit and judgment may be entered
against you.

Witness, WILLIAM A. SMITH, Esq., Judge of the
Essex County Circuit Court, at Newark, this 12th
day of June, Nineteen Hundred and Thirty-six.

RUSSELL C. GATES,
Clerk.

LEBER & RUBACK,
Attorneys. 30

NOTE: See Demand for Affidavit of Merits en-
dorsed on complaint.

LEBER & RUBACK,
Attorneys for Plaintiff.

Complaint.

(Filed June 19, 1936.)

ESSEX COUNTY CIRCUIT COURT.

10	HARVESTER BUILDING & LOAN ASSOCIATION OF NEWARK, N. J., a New Jersey corporation, Plaintiff,	}	Action at Law.
	<i>vs.</i> HANA ELBAUM and SIMON ELBAUM, Defendants.		

20 The plaintiff, Harvester Building and Loan Association of Newark, N. J., a New Jersey corporation having and maintaining its principal office and place of business in the City of Newark, County of Essex and State of New Jersey, says that:

30 1. On the 8th day of January, 1926, Hana Elbaum and Simon Elbaum did execute to the plaintiff their Bond of that date in the penal sum of Twenty-eight Thousand (\$28,000.00) Dollars, conditioned to pay the principal sum of Fourteen Thousand (\$14,000.00) Dollars, with interest at six per cent. (6%) per annum, at the time and in the manner as will more fully appear by reference to the Bond, a copy of which is hereto attached and made part hereof.

40 2. In and by the terms of said Bond it was agreed that the liability of said Hana Elbaum and Simon Elbaum should be joint and several.

Complaint.

3. To secure the said Bond, the said Hana Elbaum and Simon Elbaum, her husband, on the same day, executed a Mortgage to the plaintiff upon lands and premises owned by said Hana Elbaum, situate in the City of Newark, County of Essex and State of New Jersey, described as follows:

10

All that certain tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Newark, in the County of Essex and State of New Jersey.

BEGINNING in the westerly line of Elizabeth Avenue at a point therein distant four hundred and seventy-five feet southerly along the same from the intersection of said line with the southerly line of Clinton Avenue; from thence running westerly at right angles to Elizabeth Avenue one hundred and twenty-five feet; thence southerly parallel with Elizabeth Avenue twenty-five feet; thence easterly and parallel with the first course one hundred and twenty-five feet to said line of Elizabeth Avenue; thence northerly along the same twenty-five feet to the place of BEGINNING.

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30

Being the same premises conveyed to the said Hana Elbaum by Louis H. Rogers and wife, by deed bearing even date herewith and about to be recorded, this mortgage being given to secure a part of the purchase price for said deed of conveyance, loaned and advanced by the said Harvester Building & Loan Association of Newark, N. J.

4. On the 9th day of January, 1936, a Final Decree for the sale of said lands and premises

40

Complaint.

and the foreclosure of the said Mortgage was made in the Court of Chancery of New Jersey, in a suit brought by the plaintiff against the said Hana Elbaum and Simon Elbaum and others.

10 5. Said Decree adjudged that there was then due upon said Bond the sum of Fourteen Thousand Two Hundred Sixty-eight Dollars and Ninety-four Cents (\$14,268.94), and that a Writ of Fieri Facias be issued to the Sheriff of the County of Essex for the sale of the mortgaged premises to make the sum so due together with lawful interest from the 26th day of December, 1935, and the taxed costs of said suit amounting to Three Hundred Forty-one Dollars and Ninety-four Cents (\$341.94).

20 6. On the 31st day of March, 1936, the said Sheriff of Essex County, under authority of said Writ, sold said premises at public sale, according to law, to the plaintiff, it being the highest bidder at said sale, for the sum of One Hundred Dollars (\$100.00), which sale was in due course reported to the Chancellor of the State of New Jersey, as required by law and the rules of the Court of Chancery, and the said sale was thereafter confirmed by an Order of said Court of Chancery
30 on the 11th day of April, 1936, and within three (3) months of the commencement of this action.

7. The fees and disbursements of the Sheriff lawfully allowed upon said execution amounted to Sixty-seven Dollars and Thirty-four Cents (\$67.34), and these fees were paid by the plaintiff to said Sheriff.

40 8. On the 31st day of March, 1936, being the date of the Sheriff's sale, there was due to this

Complaint.

plaintiff on account of said Decree with interest calculated to the said 31st day of March, 1936, the sum of Fourteen Thousand Nine Hundred Eight Dollars and Forty-one Cents (\$14,908.41), representing the amount found due to this plaintiff by said Decree with interest thereon from the 26th day of December, 1935, plus the aforementioned amount of taxed costs with interest from the 16th day of January, 1936, being the date when said costs were taxed, and the said Sheriff's fees amounting to Sixty-seven Dollars and Thirty-four Cents (\$67.34); and after crediting thereon the said sum of One Hundred Dollars (\$100.00) realized from said sale, there remains due to the plaintiff the sum of Fourteen Thousand Eight Hundred Eight Dollars and Forty-one Cents (\$14,808.41). 10 20

9. The said sum of Fourteen Thousand Eight Hundred Eight Dollars and Forty-one Cents (\$14,808.41) being said balance or deficiency has not, nor has any part thereof been paid to the plaintiff.

10. On the 11th day of June, 1936, and within three (3) months after the said Sheriff's sale and the confirmation of said sale, and prior to the institution of this action, plaintiff filed in the Office of the Register of the County of Essex, wherein said mortgaged premises are situate, a written notice of this action as one proposed to be taken, setting forth therein the name of the court where such action would be brought, and the names of the parties to the aforementioned Bond and to this action, the book and page of the record of the said Mortgage, together with a description of the land or real estate described in 30 40

Demand for Affidavit of Merits.

said Mortgage, as required by Statute. A copy of said notice is hereto attached and made part hereof.

11. The action by plaintiff against defendants is commenced within three (3) months of the date of said sale of said mortgaged premises and of the date of the confirmation of said sale.

Plaintiff demands the sum of Fourteen Thousand Eight Hundred Eight Dollars and Forty-one cents (\$14,808.41) damages, with interest from the 31st day of March, 1936, and costs of this suit.

LEBER & RUBACK,
Attorneys for Plaintiff.

20

Demand for Affidavit of Merits.

To the within named Defendants:

TAKE NOTICE that if the within summons and complaint be served upon you personally and you intend to make defense then you must file an affidavit of merits within ten days of such service; and must file an answer within twenty days of such service, and that in default thereof, judgment will be entered against you.

LEBER & RUBACK,
Attorneys for Plaintiff.

40

Copy of Bond, Annexed to Complaint.

KNOW ALL MEN BY THESE PRESENTS: That we, Hana Elbaum and Simon Elbaum, of the City of Bayonne in the County of Hudson and State of New Jersey held and firmly bound unto Harvester Building & Loan Association of Newark, N. J., a body corporate of the State of New Jersey, in the sum of Twenty-eight thousand (\$28,000) Dollars—lawful money of the United States of America, to be paid to the said Association, its successors or assigns, FOR WHICH PAYMENT well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, Dated the 8th day of January, One Thousand Nine Hundred and Twenty-six. 10

THE CONDITION of the above obligation is such that if the above bounden Hana Elbaum, her heirs, executors or administrators, shall well and truly pay, or cause to be paid unto the above-named Association, its successors or assigns, the just and full sum of Fourteen thousand (\$14,000.) Dollars—in the manner following, viz: By the payment of One Dollar on each of —70— shares of the capital stock of said Association, owned by the said Hana Elbaum and standing in her name on the books of said Association, and assigned to it as collateral security for the payment hereof, and on which this loan is based, on the third Thursday of each and every month hereafter, or such other time as may hereafter be appointed for that purpose, until the said shares shall attain the par value of Two Hundred Dollars each, together with interest on said sum of Fourteen thousand (\$14,000.00) Dollars—to be computed from December 17, 1925, at the rate of six per cent, per annum, and payable monthly at the same time 20 30 40

Copy of Bond, Annexed to Complaint.

and in the same manner as the stock-payments aforesaid, and also all fines that may become due as provided for by the Constitution and By-Laws of said Association, which have been duly assented to by said obligors, and made a part hereof, without any fraud or other delay, then the above obligation to be void, otherwise to remain in full force and virtue.

10

AND IT IS HEREBY EXPRESSLY AGREED, that should any default be made in the payment of the said interest, or installment on said shares, or of any part thereof, on any day whereon the same is made payable, as above expressed, or should any tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in the mortgage accompanying this bond, and become due and payable; and should the said interest or installment on said shares remain unpaid and in arrears for the space of sixty days or said tax, assessment, water rent, or other municipal or governmental rate, charge, imposition or lien, or any or either of them, remain unpaid and in arrear for the space of sixty days or should the said obligors refuse or neglect for ten days after demand to produce and exhibit to the obligee the vouchers showing the payments of such tax, assessment, water rent or other lien due and payable, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of Fourteen Thousand (\$14,000.) Dollars or the balance thereof remaining unpaid with all arrearage of interest thereon and fines shall, at the option of the said Association, or its legal representatives, become and be

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On Bill to Foreclose, Exhibit "C-1."

due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

HANA ELBAUM, 10
SIMON ELBAUM.

Sealed and Delivered }
in the presence of }

MEYER E. RUBACK.

On Bill to Foreclose, Exhibit "C-1."

IN CHANCERY OF NEW JERSEY. 20

110/188.

Between

HARVESTER BUILDING & LOAN
ASSOCIATION OF NEWARK, N. J.,
a New Jersey corporation,
Complainant,

and

ALBERT HOLLANDER, et als.,
Defendants.

30

FRED WEISER, Master in Chancery of New Jersey.

FOR VALUE RECEIVED, I, Hana Elbaum, the within named obligor does hereby assign, transfer and set over unto the Harvester Building & Loan Association of Newark; N. J., the 70 shares 40

On Bill to Foreclose, Exhibit "C-1."

10 of stock, held by me in said Association, as collateral security for the payment of the debt mentioned in the within bond. And in case of default in payment of the dues, interest, cost of insurance or taxes upon premises mortgaged to the Association, or fines for non-payment of same, I hereby authorize said Association to make sale of said 70 shares of stock, at auction, at any general meeting thereafter, and in my name to make and execute a transfer of said 70 shares of stock to the purchaser of same, applying the proceeds of said sale to payment of said loan.

20 And further I do hereby elect to treat all past and future payments of dues on said stock as credits on the within bond and mortgage accompanying the same, and authorize and direct the officers of said Association to so appropriate and credit the same.

WITNESS my hand and seal this 8th day of January, A. D. 1926.

HANA ELBAUM,
SIMON ELBAUM.

30 Sealed and delivered }
in the presence of }
MEYER E. RUBACK.

40

**Copy of Notice of Proposed Action (Lis Pendens),
Annexed to Complaint.**

To whom it may concern:

TAKE NOTICE of a proposed action about to be begun in the Essex County Circuit Court, wherein Harvester Building and Loan Association of Newark, N. J., a New Jersey corporation, will be plaintiff, and Hana Elbaum and Simon Elbaum will be defendants, on a Bond made by said Hana Elbaum and Simon Elbaum to the said Harvester Building and Loan Association of Newark, N. J., dated the 8th day of January, 1926, in the sum of Fourteen Thousand (\$14,000.00) Dollars, for the purpose of recovering the deficiency which arose in the foreclosure of the Mortgage executed by Hana Elbaum and Simon Elbaum, her husband, to said Harvester Building and Loan Association of Newark, N. J., a New Jersey corporation, to secure the said Bond, which said Mortgage was recorded in the Register's Office of Essex County on the 9th day of January, 1926, in Book L-56 of Mortgages for said County, pages 150-152. It is proposed to enter judgment against the said Hana Elbaum and Simon Elbaum in said Essex County Circuit Court in said action on said Bond. The lands described in said Mortgage and to be effected by said proposed action are more particularly described as follows:

All that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Newark in the County of Essex and State of New Jersey.

BEGINNING in the westerly line of Elizabeth Avenue at a point therein distant four hundred and seventy-five feet southerly along the same from the intersection of said

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*Copy of Notice of Proposed Action
(Lis Pendens), Annexed to Complaint.*

10 line with the southerly line of Clinton Avenue; from thence running westerly at right angles to Elizabeth Avenue one hundred and twenty-five feet; thence southerly parallel with Elizabeth Avenue twenty-five feet; thence easterly and parallel with the first course one hundred and twenty-five feet to said line of Elizabeth Avenue; thence northerly along the same twenty-five feet to the place of BEGINNING.

20 Being the same premises conveyed to the said Hana Elbaum by Louis H. Rogers and wife, by deed bearing even date herewith and about to be recorded, this mortgage being given to secure a part of the purchase price for said deed of conveyance, loaned and advanced by the said Harvester Building & Loan Association of Newark, N. J.

The said action when commenced will be entitled as follows:

ESSEX COUNTY CIRCUIT COURT.

30 HARVESTER BUILDING & LOAN
ASSOCIATION OF NEWARK, N. J.,
a New Jersey corporation,
Plaintiff,

vs.

HANA ELBAUM and
SIMON ELBAUM,
Defendants.

Action at Law.

40 Dated, June 11, 1936.

LEBER & RUBACK,
Attorneys for Plaintiff.

Answer.

(Filed July 1, 1936.)

ESSEX COUNTY CIRCUIT COURT.

HARVESTER BUILDING & LOAN
ASSOCIATION OF NEWARK, N. J.,
a New Jersey corporation,
Plaintiff,

vs.

HANA ELBAUM and
SIMON ELBAUM,
Defendants.

10

Action at Law.

The defendants answering the bill of complaint
of the plaintiff say: 20

1. Paragraphs 1, 2, 3, 4, 5, 6, and 7 of the
bill of complaint are admitted.

2. The defendants admit the allegations, mat-
ters and things contained in paragraph 8 of the
bill of complaint but deny that there is anything
due to the plaintiff on account of the final decree
as alleged therein. 30

3. The defendants admit the allegations, mat-
ters and things contained in paragraph 9 of the
bill of complaint but deny that there is any
deficiency as such.

4. Paragraphs 10 and 11 in the bill of com-
plaint are admitted.

40

Answer.

FIRST SEPARATE DEFENSE.

1. The plaintiff herein bases its complaint upon a certain foreclosure proceeding alleged in the bill of complaint herein, wherein the plaintiff herein was the complainant. Subsequent to the
10 creation of the plaintiff's mortgage and prior to the commencement of the foreclosure suit and continuing thereafter until and after the sheriff's sale, Louis Brown and Agnes Brown, were tenants and in possession of the mortgaged premises and were not made parties to the foreclosure suit.

2. The complaint in the above entitled matter is, therefore, improperly brought and filed in law for the reason that the plaintiff, Harvester Building and Loan Association of Newark, as complainant in the foreclosure action, failed and neglected to make Louis Brown and Agnes Brown, the tenants as aforementioned, parties to the foreclosure proceeding with the result that their leasehold, interest and estate in the mortgaged premises was liberated from the effect of the foreclosure decree and their rights were not cut off or debarred thereby; and with the further result that the statute in such case made and provided
20 (3 Comp. Stat. 3421; P. L. 1933, p. 172) which requires that the owner of a bond and mortgage must first exhaust his security before undertaking to sue on the bond, has not been complied with, and with the further result that the foreclosure sale was made and the purchaser took the mortgaged premises subject to the rights of the existing tenants and subject to their possession of the mortgaged premises and for said reasons there is no cause of action for a deficiency
30 as alleged in the bill of complaint herein.
40

*Notice of Motion to Strike Answer and for Entry
of Summary Judgment.*

The defendants hereby reserve the right to move to strike the bill of complaint herein at any time before or at the trial on the ground that the same does not constitute a cause of action in that it is sham and/or frivolous.

SIMON M. SELEY,
Attorney for Defendants.

10

**Notice of Motion to Strike Answer and for
Entry of Summary Judgment.**

(Filed July 23, 1936.)

ESSEX COUNTY CIRCUIT COURT.

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HARVESTER BUILDING & LOAN
ASSOCIATION OF NEWARK, N. J.,
a New Jersey corporation,
Plaintiff,

vs.

HANA ELBAUM and
SIMON ELBAUM,
Defendants.

Action at Law.

30

*To the above named Defendants or Simon M.
Seley, Esq., Their Attorney:*

PLEASE TAKE NOTICE that on Friday the 24th day of July, 1936 at 10 A. M. (Daylight Saving Time) we shall apply to the Honorable Newton H. Porter, Judge of the Essex County Circuit

40

*Notice of Motion to Strike Answer and for Entry
of Summary Judgment.*

10 Court or to such other Judge of said Court as shall then be hearing motions, at the Essex County Court House in the City of Newark, for an Order striking the answer filed by the defendants in the above entitled action and for the entry of summary judgment in favor of the plaintiff and against the defendants, which application will be based upon the following grounds:

(1) Said answer does not set forth any legal defenses:

(2) Said answer and the defenses thereby presented are sham.

20 TAKE FURTHER NOTICE that in support of our said application we shall rely upon the affidavits of Herman Rieke, Max M. Albach and Nathan Perselay, hereto attached.

Dated, July 17, 1936.

LEBER & RUBACK,
Attorneys for Plaintiff.

30

40

Affidavit of Herman Rieke.

ESSEX COUNTY CIRCUIT COURT.

<p>HARVESTER BUILDING & LOAN ASSOCIATION OF NEWARK, N. J., a New Jersey corporation, Plaintiff,</p>	}	
---------------------------------------------------------------------------------------------------------------------	---	--

vs.

<p>HANA ELBAUM and SIMON ELBAUM, Defendants.</p>	}	
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Action at Law.

10

<p>STATE OF NEW JERSEY, COUNTY OF ESSEX.</p>	}	ss.:
--------------------------------------------------	---	------

20

HERMAN RIEKE, being duly sworn according to law, on his oath, deposes and says:

I am Assistant Treasurer of the Harvester Building & Loan Association of Newark, N. J., the above named plaintiff, and I am in charge of the management of the property of said Association, including premises at No. 39 Elizabeth Avenue, Newark, New Jersey, being the premises referred to in the complaint filed in the within action encumbered by the plaintiff's mortgage, securing the bond on which the within suit is brought. I take care of the renting of the plaintiff's property and of the dispossession of tenants therefrom and I was in such charge during the entire period of time herein mentioned and referred to.

30

The premises in question are a two family frame dwelling house located at the above address. The said premises became vacant in May, 1935, the tenants previously occupying the premises

40

Affidavit of Herman Rieke.

having either moved or been dispossessed. The said premises continued to remain vacant and untenanted in their entirety from May, 1935 until September 1, 1935. On July 23, 1935, being the date on which I am informed, the *lis pendens* was filed in the foreclosure action then pending in
10 Chancery of New Jersey, wherein Harvester Building & Loan Association of Newark, N. J. was the complainant, and Hana Elbaum and Simon Elbaum and others were defendants, which foreclosure action is referred to in the plaintiff's complaint filed herein, the said premises were uninhabited nor was there outstanding any leasehold or tenancy interest therein.

Some time prior to May 1, 1935, the Board of
20 Directors of the Harvester Building & Loan Association, the plaintiff above named, passed a resolution to take possession of the property, and under the authority of said resolution I took possession of said property for said Harvester Building & Loan Association and it became thereby a mortgagee in possession. The tenants then in the said premises were not paying any rent and I had them vacate the premises. Thereafter on August 22, 1935, being approximately one
30 month after the filing of the *lis pendens* in the said foreclosure proceedings, I rented the said premises for the said Harvester Building & Loan Association as mortgagee, in possession, to one Louis Brown, as a monthly tenant, who, together with his wife, took possession of the said premises on or about September 1, 1935. It is not true, as alleged in the answer of the defendants, Hana Elbaum and Simon Elbaum, filed in the within cause, that subsequent to the creation of
40 plaintiff's mortgage and prior to the commencement of the foreclosure suit the said Louis and

Affidavit of Herman Rieke.

Agnes Brown were tenants and in possession of the mortgaged premises, the fact being that one of the apartments in the said premises was rented to the said Louis Brown fully a month after the said bill of complaint in said foreclosure action was filed and after the *lis pendens* was filed, as above stated.

10

On March 1, 1936, I served a one month's notice of the termination on April 1, 1936, of the tenancy of the said Louis Brown and requiring him to remove from and vacate the said premises on the 1st day of April, 1936. At the time of the Sheriff's sale held in the said foreclosure proceeding the Sheriff of Essex County was in a position to sell and did in fact sell to the purchaser of the said premises the full and complete title to the said property, free and clear of any tenancies or tenancy or leasehold interest in the mortgaged premises. With the Sheriff's deed thereafter delivered there actually passed to the grantee the possession of said premises in their entirety.

20

HERMAN RIEKE.

Sworn and subscribed to before }
me this 17th day of July, 1936. }

30

MAX M. ALBACH,
Master in Chancery of New Jersey.

40

Affidavit of Max M. Albach.

ESSEX COUNTY CIRCUIT COURT.

10	HARVESTER BUILDING & LOAN ASSOCIATION OF NEWARK, N. J., a New Jersey corporation, Plaintiff, <i>vs.</i> HANA ELBAUM and SIMON ELBAUM, Defendants.	} Action at Law.
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20 STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } ss.:

MAX M. ALBACH, of full age, being duly sworn according to law, on his oath, deposes and says:

30 I am associated with Leber & Ruback, attorneys for the plaintiff above named, who were also the solicitors in Chancery of the said above named plaintiff in a foreclosure suit wherein it was complainant and the said Hana Elbaum and Simon Elbaum and others were defendant, in which suit the premises mentioned and described in the within action were foreclosed. I was in charge of said foreclosure proceedings and am familiar with all the details relating thereto. The bill in said foreclosure cause was filed on the 20th day of July, 1935 in the office of the Clerk of the Court of Chancery at Trenton, New Jersey, and thereafter, on the 23rd day of July, 1935, I filed a *lis pendens* in the office of the Register of the County of Essex, as required by the statute in such case made and provided.

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Affidavit of Max M. Albach.

I attended the Sheriff's sale in the said matter held on the 31st day of March, 1936 and at said Sheriff's sale and before the property was actually cried off I publicly announced that the said premises were being sold subject only to taxes and assessments unpaid and a lien against the said premises and such state of facts as an accurate survey would disclose and were being sold free of all tenancies or rights of tenants in the premises. I further announced that with the Sheriff's deed would go the possession of the property in question. Such announcement was read by me from a prepared statement, whereof the following is a true copy:

March 31, 1936

TO THE SHERIFF OF ESSEX COUNTY: 20

Re. *Harvester B. & L. Assn. v. Albert Hollander, et als.*

The within premises are sold subject only to taxes and assessments unpaid and a lien against said premises and such state of facts as an accurate survey would disclose and are specifically sold free of all tenancies or rights of tenants in the property and possession will be given upon delivery of the Sheriff's deed. 30

It has been my steady practice for many years to present and read at Sheriff's sales a statement of the liens and other conditions, subject to which the purchaser buys and will accept title. This practice is general in Essex County and it is the fixed custom of the Sheriff before taking the first bid to ask complainant's counsel what further encumbrances there are.

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Affidavit of Max M. Albach.

The sale was confirmed on April 11, 1936 and the deed was actually delivered on May 5, 1936. By said last mentioned date the premises in question were entirely vacant, the tenant Louis Brown, together with his wife, Agnes Brown, having previously vacated the apartment so as
10 aforesaid occupied by him.

Before filing the bill of complaint in the above mentioned foreclosure action and again after the filing of the *lis pendens*, I visited the premises in question and found the said premises entirely vacant and untenanted. I also checked up with Mr. Herman Riecke, the person in charge of renting the said premises, and ascertained from him that said premises were not rented to any person and that no person had any leasehold or tenancy
20 rights therein when the bill to foreclose was filed and the *lis pendens* thereafter was filed.

MAX M. ALBACH.

Sworn and subscribed to before me }
this 16th day of July, 1936. }

SADIE HAUSMAN,
Notary Public of N. J.

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Affidavit of Nathan Perselay.

ESSEX COUNTY CIRCUIT COURT.

HARVESTER BUILDING & LOAN
ASSOCIATION OF NEWARK, N. J.,
a New Jersey corporation,
Plaintiff,

vs.

HANA ELBAUM and
SIMON ELBAUM,
Defendants.

Action at Law.

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STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

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NATHAN PERSELAY, of full age, being duly sworn, according to law, on his oath deposes and says:

I am the Secretary of Harvester Building & Loan Association of Newark, N. J., the plaintiff in the above entitled action and I am acquainted with its business and fiscal affairs.

Said Association is possessed of the cause of action for the deficiency set forth in the complaint filed by it in the above action. It is the holder of the bond dated January 8, 1926 made unto it by the defendants, Hana Elbaum and Simon Elbaum conditioned for the payment of the principal sum of \$14,000, with interest at 6% per annum. The payment of said bond was collaterally secured by the mortgage mentioned in the complaint herein, which mortgage was foreclosed by suit in the Court of Chancery of New Jersey, wherein a Final Decree was entered on

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Affidavit of Nathan Perselay.

January 9, 1936 adjudging there was due on said bond and mortgage the sum of \$14,268.94 together with interest from December 26, 1935 and the taxed costs of said suit amounting to a further sum of \$341.94.

10 By virtue of a writ of *fi fa* directed by said Decree to be issued the mortgaged premises were sold at public sale on March 31, 1936 for the sum of \$100, which sale was thereafter on April 11, 1936 confirmed by the Order of the Chancellor of the State of New Jersey.

On said date of sale there was due to the plaintiff herein on said bond the following sums:

	Amount adjudged by the Decree	\$14,268.94
20	Interest on Decree to date of Sheriff's sale	225.91
	Taxed costs	341.94
	Interest on taxed costs.....	4.28
	Sheriff's fees	67.34
		<hr/>
		\$14,908.41

30 After crediting against the foregoing indebtedness the sum of \$100 realized at said sheriff's sale there remained due from the defendants to the plaintiff on said bond the sum of \$14,808.41. No part thereof has been paid and there is due on said bond from the defendants to the plaintiff on the day of the making of this affidavit the aforementioned indebtedness of \$14,808.41 together with interest at 6% per annum computed from March 31, 1936.

40 There are no credits, set-offs or counterclaims against the foregoing indebtedness to which the defendants may be entitled and the full indebted-

Affidavit of Louis Brown.

ness of \$14,808.41 with interest to be computed as aforesaid is justly due and owing.

NATHAN PERSELAY.

Sworn and subscribed to before me }
 this 17th day of July, 1936. } 10

JOSEPH A. WEISMAN,
 A Master in Chancery of New Jersey.

Defendants' Reply Affidavits.

(Filed July 24, 1936.)

Affidavit of Louis Brown.

ESSEX COUNTY CIRCUIT COURT. 20

HARVESTER BUILDING & LOAN
 ASSOCIATION OF NEWARK, N. J.,
 a New Jersey corporation,
 Plaintiff,

vs.

HANA ELBAUM and
 SIMON ELBAUM,
 Defendants.

Action at Law.

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STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } ss.:

LOUIS BROWN, of full age, being duly sworn, according to law, on his oath, deposes and says:

On or about August 23, 1935, I rented apartment consisting of four rooms and bath at prem- 40

Affidavit of Louis Brown.

ises No. 39 Elizabeth Avenue, Newark, New Jersey from H. Rieke, agent of Harvester Building & Loan Association for \$25.00 per month, beginning September 1, 1935.

10 On September 1, 1935 I moved into the afore-said apartment with my wife, Agnes Brown and my children and we continued to live in said apartment as monthly tenants until May 1, 1936.

20 On or about and during the month of April, 1936, a short while before Easter, Mr. Rieke delivered to me a notice signed by Nathan Perselay, secretary of the Harvester Building & Loan Association, directing me as the tenant of 39 Elizabeth Avenue, Newark, New Jersey to vacate the premises as of April 1, 1936 and told me not to pay any attention to said notice. I occupied said apartment, however, until May 1, 1936 and paid the rent to the said Harvester Building and Loan Association to and including the month of April, 1936.

LOUIS BROWN.

Subscribed and sworn to before me }
this 23rd day of July, 1936. }

30 RICHARD E. SILBERMAN,
An Attorney at Law of N. J.

Affidavit of Simon Elbaum.

(Filed July 24, 1936.)

ESSEX COUNTY CIRCUIT COURT.

HARVESTER BUILDING & LOAN
ASSOCIATION OF NEWARK, N. J.,
a New Jersey corporation,
Plaintiff,

vs.

HANA ELBAUM and
SIMON ELBAUM,
Defendants.

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Action at Law.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

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SIMON ELBAUM, of full age, being duly sworn according to law, on his oath, deposes and says:

I am one of the defendants in the above entitled action. On November 6, 1935, the defendant Hana Elbaum, who is my wife, and I were served with a subpoena and ticket by the sheriff of Essex County in an action entitled in Chancery of New Jersey, between Harvester Building & Loan Association of Newark, New Jersey, a New Jersey corporation, complainant, and Albert Hollander, et als., defendants. The subpoena was dated, October 29, 1935, signed by Edw. L. Whelan, Clerk and Leber & Ruback, Sol'rs.

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On November 7th, 1935, I delivered said subpoena and ticket to my attorney, Simon M. Seley, who in my presence wrote to Messrs. Leber & Ruback, requesting a copy of the bill of complaint in said matter. A day or two thereafter, my attorney advised me that he received such

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Affidavit of Simon Elbaum.

bill of complaint. I called upon my attorney, who read the contents of the bill of complaint to me, alleging in substance that the Harvester Building & Loan Association was foreclosing a mortgage in the sum of \$14,000 against Hana Elbaum, and Simon Elbaum, her husband, covering premises 39 Elizabeth Avenue, Newark, New Jersey. The defendants in said complaint consist of the following: Albert Hollander and Nettie Hollander, his wife, Hana Elbaum and Simon Elbaum, her husband, Samuel F. Leber, Trustee of Guardian Trust Company of New Jersey in liquidation and Long Branch Banking Company, a corporation. The name of Louis Brown does not appear as a party defendant therein. The bill of complaint refers to the mortgage mentioned in the plaintiff's complaint in this case, described in paragraph one therein and covers the same premises described in paragraph three therein and generally relates to the subject matter upon which the cause of action herein is predicated.

It appears that the action to foreclose the mortgage described in the complaint herein did not commence prior to October 29, 1936, the date of the subpoena or the subsequent date of the issuance thereof.

SIMON ELBAUM.

Subscribed and sworn to before me }
 this 23rd day of July, 1936. }

RICHARD E. SILBERMAN,
 An Attorney at Law of New Jersey.

Judge's Opinion on Motion to Strike Answer.

(Filed February 26, 1937.)

ESSEX CIRCUIT COURT,

Newark, New Jersey.

CHARLES W. PARKER
 Supreme Court Justice
 WILLIAM A. SMITH
 NEWTON H. PORTER
 JOSEPH L. SMITH
 Circuit Judges

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February 26, 1937.

Harvesters B. & L. Assn. vs. Elbaum.

LEBER & RUBACK, Esqrs.,
 60 Park Place, Newark, N. J.

SIMON M. SELEY, Esq.,
 11 Commerce Street, Newark, N. J.

20

Dear Sirs:

The motion is to strike the answer. The suit is to recover the deficiency on a bond after foreclosure. The defense is that there has not been an exhaustion of the mortgage security under the foreclosure because tenants' rights were not cut off, they not having been made parties to the suit.

The salient facts do not seem disputed. The plaintiff as mortgagee was in possession of the mortgaged property prior to the institution of the foreclosure suit. It filed the bill July 20, 1935, its *lis pendens* July 23, 1935. Subpoena was tested October 29, 1935 and served upon defendants November 7, 1935. Sheriff's sale was held March 31, 1936, and confirmed April 11, 1936. After the bill and *lis pendens* were filed and before the subpoena was tested or served Louis and Agnes Brown became tenants in the mortgaged premises. They were not made parties.

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Judge's Opinion on Motion to Strike Answer.

10 The law is settled that, before an action for deficiency will lie, there must be a complete exhaustion of the mortgage security. The rights of tenants must be cut off by making tenants parties to the foreclosure suits. With these views counsel are in accord. But it is argued by the plaintiff that the tenancy had been terminated before the sale of confirmation thereof even though the tenant was in possession on those dates and, in fact, until May 1, 1936.

20 A careful consideration of the briefs and cited authorities leads me to the conclusion that the tenants in question were necessary parties to the foreclosure suit, that the sale was not in fact or in law free from that tenancy even though so announced. This is so, in my opinion, even though the tenant was willing to and did surrender possession on a subsequent date. As I read the opinion in the recent case of *Italian-American B. & L. Association v. Liotta*, the case at bar in principle falls within the reasoning there, which of course is controlling here.

For these reasons, the motion to strike the answer is denied.

Yours truly,

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NEWTON H. PORTER,
Judge.

NHP:RCS.

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Order Denying Motion to Strike Answer.

(Filed March 1, 1937.)

ESSEX COUNTY CIRCUIT COURT.

HARVESTER BUILDING & LOAN ASSOCIATION OF NEWARK, N. J., a New Jersey corporation, Plaintiff,	}	Action at Law.
vs.		
HANA ELBAUM and SIMON ELBAUM, Defendants.	}	

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This matter having come on to be heard on motion to strike the answer filed herein and the court having considered the affidavits filed by the parties and the briefs submitted, it is on this 1st day of March, 1937,

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ORDERED that the motion to strike the answer of the defendants herein be and the same is hereby denied.

NEWTON H. PORTER,
 Circuit Court Judge.

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Plaintiff's Reply.
(Filed May 10, 1937.)

ESSEX COUNTY CIRCUIT COURT.

10	<p style="text-align: center;">HARVESTER BUILDING & LOAN ASSOCIATION OF NEWARK, N. J., a New Jersey corporation, Plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">HANA ELBAUM and SIMON ELBAUM, Defendants.</p>	} Action at Law.
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20 The plaintiff, replying to the First Separate Defense of the defendants' Answer, says:

1. It denies the allegations contained in paragraph 1 of the First Separate Defense that "prior to the commencement of the foreclosure suit and continuing thereafter until and after the sheriff's sale, Louis Brown and Agnes Brown were tenants and in possession of the mortgaged premises." And the other allegations of said paragraph are admitted.

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2. It admits so much of paragraph 2 of the First Separate Defense as alleges that complainant did not make Louis Brown and Agnes Brown parties to the foreclosure action or proceeding mentioned in the first paragraph of said First Separate Defense. All the other allegations of said second paragraph are hereby denied.

40 3. The Bill of Complaint in said foreclosure action or proceeding was filed in the Court of

Plaintiff's Reply.

Chancery of New Jersey on July 20, 1935. The mortgaged premises affected by said foreclosure suit consisted of a curtilage of land with a dwelling house thereon containing two flats or apartments, situate in the City of Newark, Essex County, New Jersey. On July 23, 1935 plaintiff caused to be filed in the Register's Office of Essex County a *lis pendens*, giving notice in accordance with the statute of the pendency of said foreclosure suit. On that date the mortgaged premises were in their entirety vacant and untenanted. Thereafter, on August 22, 1935, plaintiff having as mortgagee taken possession of said premises, rented one of said flats or apartments to Louis Brown as a monthly tenant, such tenancy to commence on September 1, 1935. Thereafter, on March 1, 1936, plaintiff caused to be served upon the said Louis Brown a one month's notice of the termination of said tenancy, requiring the said Louis Brown to remove from and vacate the said flat or apartment on April 1, 1936. Said tenancy actually terminated on April 1, 1936 and the said tenant, Louis Brown, actually vacated the said premises a few days thereafter.

The Sheriff's sale of said premises was held on March 31, 1936, one day before the said tenancy of Louis Brown terminated. At said sale and before the bidding commenced the plaintiff caused an announcement to be made to all bidders present that the said premises would be sold free of all tenancies or rights of tenants in the property and that possession would be given upon delivery of the Sheriff's deed. The sale was confirmed by the Chancellor of the State of New Jersey on April 11, 1936 and the deed was actually delivered by the Sheriff to the purchaser on

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Plaintiff's Reply.

May 5, 1936. On both said dates the mortgaged premises, sold as aforesaid, were wholly untenanted. With the delivery of the Sheriff's deed to the purchaser was delivered actual and full possession of the entire premises sold at said Sheriff's sale.

10 On the date of the filing of the *lis pendens*, as aforesaid, on the date of the confirmation of sale, as aforesaid, and on the said date of the delivery of the deed by the Sheriff to the purchaser (plaintiff herein) neither the said Louis Brown nor any other person was in possession of the mortgaged premises or any part thereof. On all of said dates said premises were in their entirety vacant and untenanted.

20 4. At said Sheriff's sale held on March 31, 1936 neither the vendible value of the mortgaged lands and premises nor the bidding therefor was in any way lessened or affected by the circumstance that on that day there existed the aforementioned tenancy of Louis Brown, which tenancy was then subject to the force and operation of the aforementioned notice of termination and which tenancy actually terminated the following day, viz., April 1, 1936, and approximately ten
30 days before said Sheriff's sale was duly confirmed by the Chancellor of the State of New Jersey.

LEBER & RUBACK,
Attorneys for Plaintiff.

The within reply may be filed as within time.

Dated, May 6, 1937.

40 SIMON M. SELEY,
Attorney for Defendants.

**Defendants' Notice of Motion to Strike Reply
and for Summary Judgment.**

(Filed May 19, 1937.)

ESSEX COUNTY CIRCUIT COURT.

HARVESTER BUILDING & LOAN
ASSOCIATION OF NEWARK, N. J.,
a New Jersey corporation,
Plaintiff,

vs.

HANA ELBAUM and
SIMON ELBAUM,
Defendants.

Action at Law.

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To Leber & Ruback, Attorneys for Plaintiff:

Sirs:

PLEASE TAKE NOTICE that on Friday, May 21, 1937, I shall apply to the Honorable Newton H. Porter, Judge of the Essex County Circuit Court at the Court House, Newark, at 10 A. M., or as soon thereafter as counsel can be heard, for an order striking out plaintiff's reply and entering summary judgment against the plaintiff, upon the ground that the said reply is sham and frivolous.

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TAKE FURTHER NOTICE, that as a basis for said motion, I shall rely upon the affidavits submitted on plaintiff's motion to strike defendants' answer.

Dated, May 17th, 1937.

Yours, etc.,

SIMON M. SELEY,
Attorney for Defendants.

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Plaintiff's Affidavits in Opposition to Defendants' Motion for Summary Judgment.

(Filed May 21, 1937.)

Affidavit of Herman Riecke.

ESSEX COUNTY CIRCUIT COURT.

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HARVESTER BUILDING & LOAN
ASSOCIATION OF NEWARK, N. J.,
a New Jersey corporation,
Plaintiff,

vs.

HANA ELBAUM and
SIMON ELBAUM,
Defendants.

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Action at Law.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

HERMAN RIECKE, of full age, being duly sworn according to law, on his oath deposes and says:

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I am the Herman Riecke who heretofore made affidavit in this cause, verified on July 17, 1936. My attention has been called to an affidavit made herein by Louis Brown, sworn to on July 23, 1936, in which he says that he continued to live with his family in the apartment at No. 39 Elizabeth Avenue, Newark, N. J., until May 1, 1936. I deny that fact and say that he vacated the said apartment during the first week of the month of April, 1936.

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In said affidavit the said Louis Brown says that on or about and during the month of April, 1936

Affidavit of Herman Riecke.

I delivered to him a notice directing him as tenant to vacate the premises as of April 1, 1936 and that I told him to pay no attention to the notice. I deny the foregoing statement of fact. I delivered the notice to Mr. Brown on March 1, 1936, as stated in my earlier affidavit. That notice required him to vacate the premises on April 1, 1936. At no time did I tell Mr. Brown to pay no attention to the notice. I further deny that the said Louis Brown paid rent for any part of the month of May, 1936. 10

HERMAN RIECKE.

Sworn and, subscribed to before me }
 this 20th day of May, 1937. } 20

SADIE HAUSMAN,
 Notary Public of New Jersey.

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Affidavit of Michael A. Stavitsky.

ESSEX COUNTY CIRCUIT COURT.

10	HARVESTER BUILDING & LOAN ASSOCIATION OF NEWARK, N. J., a New Jersey corporation, Plaintiff, <i>vs.</i> HANA ELBAUM and SIMON ELBAUM, Defendants.	}	Action at Law.
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20 STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } ss.:

MICHAEL A. STAVITSKY, of full age, being duly sworn according to law, on his oath deposes and says:

30 I am in the real estate business in the City of Newark and have been so engaged for 15 years. I have during those years been acquainted with market conditions and market values of real estate in the City of Newark. I am also acquainted with the property known as No. 39 Elizabeth Avenue, Newark, N. J., which was sold by the Sheriff of Essex County at foreclosure sale on March 31, 1936. I am informed that on said date there was a tenant by the name of Brown in possession of one of the two apartments in that property; that he was a monthly tenant and that he had been served with a notice to quit the premises on April 1, 1936. It is my opinion as a real estate expert that the occupancy of the one
 40 apartment by the tenant Brown could not and

Affidavit of Michael A. Stavitsky.

did not affect the vendible value of the property on the date of sale, and this for two reasons, viz.:

1. A two-family house, unlike a one-family house, is investment property and when purchased is purchased because of its rental yield. It is to the advantage of the purchaser that at least one of the apartments be occupied. If such occupancy be by a monthly tenant and the rental is unreasonably low, the purchaser can adequately control the situation by a thirty-day notice to quit and the re-renting of the premises at such higher rent as the premises command. One vacancy in a two-family house presents the advantage of enabling the purchaser to take occupancy himself, if that be the purpose of his purchase.

Unlike a tenancy for a term of years, a monthly tenancy is no factor in the determination of the vendible value of the property, since the tenancy can always be terminated upon thirty days' notice. Thus, if the rent is lower than what it should be, the tenancy may be terminated by the purchaser; if the rent is satisfactory, the tenancy is permitted to continue.

2. In the case of the instant tenancy of Louis Brown, the notice to quit, given on March 1, 1936, operated to terminate the tenancy on April 1, 1936. All that remained to be done to secure possession was to bring summary action in the District Court, in which proceeding possession can actually be secured well within ten days.

I am also informed that when the property was sold on March 31, 1936 an announcement was made before the bidding that the premises were being sold free of tenancies and that posses-

Affidavit of Michael A. Stavitsky.

10 sion would be delivered with the deed. From my experience I know that such an announcement induces the free and unrestricted bidding by those persons who desire to buy the property free of the rights of tenants, for they assume the truth of the representation involved in the announcement and they bid on the assumption that if and when the sale is confirmed and a Sheriff's deed delivered, possession will accompany the deed.

MICHAEL A. STAVITSKY.

Sworn and subscribed to before me }
 this 20th day of May, 1937. }

20 JOSEPH SCHOENHOLZ,
 An Attorney at Law of N. J.

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**Judge's Opinion on Defendants' Motion to
Strike Reply and for Summary Judgment.**

(Filed May 28, 1937.)

ESSEX CIRCUIT COURT,

Newark, New Jersey.

CHARLES W. PARKER
Supreme Court Justice
WILLIAM A. SMITH
NEWTON H. PORTER
JOSEPH L. SMITH
Circuit Judges

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May 28, 1937.

In Essex Circuit Court.

Harvesters B. & L. Assn. v. Elbaum.

SIMON M. SELEY, Esq.,
11 Commerce Street, Newark, N. J.

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LEBER & RUBACK, Esqs.,
60 Park Place, Newark, N. J.

Dear Sirs:

On May 21 a motion to strike the plaintiff's reply and for judgment for the defendant was argued and decision reserved. Some months ago the plaintiff moved to strike the answer which was denied for reasons set forth in my letter of February 26, 1937. The suit is to recover a deficiency on a mortgage bond after foreclosure. The defense is failure to exhaust the mortgage security in that a tenant in the property was not made a party to the foreclosure action. It is argued by the plaintiff with great force that the question now presented by the present state of the pleadings is not the same as obtained when the above-mentioned decision on the motion to strike the answer was rendered.

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*Judge's Opinion on Defendants' Motion to
Strike Reply and for Summary Judgment.*

10 It is true that some new facts are now before
the court with respect to the tenancy, but the legal
situation in principle, it seems to me, is not
changed even after conceding that the matters
in the new affidavits are true. At the argument
counsel for the defendant did concede the truth
of said affidavits for the purpose of the argument.

I have given careful consideration to the oral
argument and have also again examined the able
and exhaustive briefs which were submitted on
the earlier motion. The factual situation as now
shown does not alter my previous conclusions that
the Liotta case referred to in my previous deci-
sion is controlling and precludes recovery in the
case at bar.

20 The motion to strike the reply and for judg-
ment for the defendant is granted.

Yours truly,

NEWTON H. PORTER,
Circuit Court Judge.

NHP-A

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**Order Striking out Reply and for Summary
Judgment.**

(Filed June 17, 1937.)

ESSEX COUNTY CIRCUIT COURT.

HARVESTER BUILDING & LOAN
ASSOCIATION OF NEWARK, N. J.,
a New Jersey corporation,
Plaintiff,

vs.

HANA ELBAUM and
SIMON ELBAUM,
Defendants.

Action at Law.

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This matter coming on to be heard in the presence of Meyer E. Ruback of the firm of Leber & Ruback, attorneys for the plaintiff and Simon M. Seley, attorney for defendants, and it appearing to the satisfaction of the court by affidavits and proof on file that the reply filed in this cause is frivolous and without legal sufficiency, it is on this 4th day of June, 1937, on motion of Simon M. Seley, attorney for defendants,

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ORDERED that the reply filed by the plaintiff be and the same hereby is stricken out, and it is further

ORDERED that judgment final be and the same is hereby entered in favor of the defendants, Hana Elbaum and Simon Elbaum and against the plaintiff, Harvester Building & Loan Association of Newark, together with costs to be taxed.

NEWTON H. PORTER,
Circuit Court Judge.

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Judgment Record.

ESSEX COUNTY CIRCUIT COURT.

10	<p>HARVESTER BUILDING & LOAN ASSOCIATION OF NEWARK, N. J., a New Jersey corporation, Plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> <p>HANA ELBAUM and SIMON ELBAUM, Defendants.</p>	<p>Action at Law. On Order Striking Out Reply by Order of the Court. Judgment Entered June 17, 1937. Costs \$33.95 Defendants. Judge Newton H. Porter. 71097.</p>
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SIMON M. SELEY, Attorney for Defendants.

20 Summary judgment on order striking out reply by order of the Court in the above entitled action was rendered on the fourth day of June, A. D. Nineteen Hundred and Thirty-seven in favor of the defendants Hana Elbaum and Simon Elbaum and against the plaintiff Harvester Building and Loan Association of Newark, N. J., a New Jersey corporation, for the sum of Thirty-three Dollars and Ninety-five Cents costs of suit.

30 Judgment signed June 4, 1937.
Judgment entered June 17, 1937.

CHARLES W. PARKER,
J.

Book 127, page 341, Circuit Court Judgments.

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**Certificate by Circuit Court Clerk to
Transcript.**

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

I, RUSSELL C. GATES, Clerk of the Circuit Court,
in and for the County of Essex in the State of
New Jersey, 10

DO HEREBY CERTIFY that the foregoing is a true
and correct copy of the Notice of Appeal and
Transcript of all the pleadings in the case of
Harvester Building and Loan Association of
Newark, N. J., a New Jersey corporation, Plain-
tiff *vs.* Hana Elbaum and Simon Elbaum, De-
fendants, and judgment recorded June 17, 1937
in Book 127, page 341 of Circuit Court Judgments
and the same is taken from and compared with 20
original papers and records filed and entered in
the County Clerk's Office and as the same now
remains on the files of said Court.

IN TESTIMONY WHEREOF, I have hereunto set my
hand and affixed the official seal of said Court
and County at Newark, N. J., this Thirty-first day
of August, A. D. 1937.

(Court's Seal.)

RUSSELL C. GATES,
Clerk.

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Opinion of Court of Errors and Appeals.

(Filed January 26, 1938.)

NEW JERSEY COURT OF ERRORS
AND APPEALS.

No. 76, OCTOBER TERM, 1937.

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 HARVESTER BUILDING AND LOAN
ASSOCIATION OF NEWARK, N. J.,
Plaintiff-Appellant,
vs.
 HANA ELBAUM and
SIMON ELBAUM,
Defendants-Respondents.

Opinion.

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Argued October 25th and 26th, 1937.

Decided January 26, 1938.

On appeal from the Essex County Circuit
Court.

For the appellant, LEBER & RUBACK.

For the respondents, SIMON M. SELEY.

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On the Brief, LESTER SANDLES,
RICHARD E. SILBERMAN.The opinion of the court was delivered by
WELLS, J.

This is plaintiff's appeal from a judgment entered in the Essex County Circuit for the defendants, on an order striking the plaintiff's reply to the defendants' answer.

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The facts as found in the plaintiff's pleadings and supporting affidavits were conceded as true

Opinion of Court of Errors and Appeals.

for the purpose of the argument before the court below and will be accepted as true for the purpose of this appeal.

It appears that on July 20, 1935, the plaintiff instituted foreclosure proceedings on a \$14,000 mortgage given by the defendants, and three days later filed the *lis pendens*. In the latter part of August, the plaintiff, who, as a mortgagee had taken possession of the mortgaged premises previous to the institution of foreclosure proceedings, rented one of the two apartments to Louis and Agnes Brown. These tenants took possession on September 1. On October 29, of the same year, the subpoena in the foreclosure was tested and on November 7 served on the defendants. On March 1, 1936, the assistant secretary of the plaintiff Building and Loan Company served notice upon the tenants Louis and Agnes Brown to vacate the apartment on April 1, 1936. On March 31, the mortgaged premises were sold at sheriff's sale to the plaintiff for \$100. At this sale the attorney for the plaintiff publicly announced that: "The within premises are sold subject only to taxes and assessments unpaid and a lien against said premises and such state of facts as an accurate survey would disclose and are specifically sold free of all tenancies or rights of tenants in the property and possession will be given upon delivery of the Sheriff's deed." Sometime within the first week in April the tenants vacated the apartment. On April 11, 1936, the sale was confirmed by the Chancellor and on May 5, 1936 the deed was actually delivered.

Within the proper time, the plaintiff commenced its suit in the Essex County Circuit Court on the bond against the defendants for the resultant deficiency. The defendants set up in their answer the failure of the plaintiff to make the

Opinion of Court of Errors and Appeals.

10 Browns, the tenants, parties to the foreclosure suit, alleging that their leasehold was not cut off by the foreclosure decree and that plaintiff had not therefore exhausted its security before suing on the bond as provided in P. L. 1933, p. 172. The plaintiff moved to strike this defense as "sham and/or frivolous" and in support of this motion presented affidavits containing the facts above set forth. The court below denied this motion on the ground that the recent decision of this Court in *American Italian B. & L. Association vs. Liotta*, 117 N. J. L. 467, was controlling.

20 The plaintiff thereafter filed a reply in which it alleged that: "At said Sheriff's sale held on March 31, 1936, neither the vendible value of the mortgaged lands and premises nor the bidding therefore was in any way lessened or affected by the circumstance that on that day there existed the aforementioned tenancy of Louis Brown, which tenancy was then subject to the force and operation of the aforementioned notice of termination and which tenancy actually terminated the following day, viz; April 1, 1936, and approximately ten days before said Sheriff's sale was duly confirmed by the Chancellor of the State of New Jersey." The defendants then moved to strike this reply as sham and frivolous. In opposition to this motion the plaintiff presented affidavits by its assistant secretary and a local real estate expert supporting the allegations set forth in its reply. The Court below was of the opinion that the additional facts alleged in the reply and supported by affidavits did not free the instant case from the controlling force of the *Liotta* case, *supra*, and therefore granted the defendants' motion and struck the reply as frivolous.

40

Opinion of Court of Errors and Appeals.

In doing this, we think the Court below failed to observe the material distinction between the instant case and the Liotta case. In the Liotta case, the plaintiff neither alleged in its pleadings nor attempted to prove at the trial that the presence of the tenancy which was unaffected by the foreclosure decree, had not lessened the vendible value of the mortgaged premises by deterring bidders at the time of the Sheriff's sale. This is likewise true of the plaintiffs in cases similar to the Liotta case, such as *Polish Home B. & L. Association vs. Burinefsky*, 119 N. J. L. 1; *Guardian Life Ins. Co. vs. Lowenthal*, 13 N. J. Misc. 849, (Sup. Ct. 1935); *Chodosh vs. Schlesinger*, 14 N. J. Misc. 599 (Cir. Ct. 1936).

In the absence of such allegation and proof, the presumption naturally arose in the above mentioned cases that since the presence of a tenant on the mortgaged premises, whose term was unaffected by the foreclosure decree, might deter a certain class of bidders at the Sheriff's sale so that the best price would not be obtained, such tenancy did in fact cause such a result.

The statute which is controlling in this case is as follows:

“In all cases where a bond and mortgage has or may hereafter be given for the same debt, all proceedings to collect said debt shall be, first, to foreclose the said 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 said debt, interest and costs, then and in such case it shall be lawful to proceed on the bond for the deficiency, and that all suits on said bond shall be commenced within

Opinion of Court of Errors and Appeals.

three months from the date of the sale of said mortgaged premises, and judgment shall be rendered and execution issue only for the balance of debt and costs of suit." P. L. 1933, p. 172.

10 "First, to foreclose the said mortgage,' What does it mean? We are of the opinion that it means a foreclosure that will result in a complete exhaustion of the property and all interest therein," said Mr. Justice Perskie in speaking for this Court in the *Liotta* case, wherein he adopted the reasoning stated and the construction placed upon the statute by Mr. Justice Lloyd in the case of *Deal Park Co. vs. Bannard*, 2 N. J. Misc. 194. In the latter case, at page 195, we find the following

20 comment: "It seems to me that nothing short of a complete exhaustion of the property and all interests therein must be had to satisfy the requirements of the statute. To hold otherwise would be to permit frauds upon the statute and upon the obligor, and frustrate the purpose of the law."

Now what is the purpose or reason for this statutory requirement to first "exhaust" the security completely? We believe that this reason is a practical rather than a theoretical one. The

30 legislative intent, as interpreted by the courts, shows a 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. If this is done, the property has been "exhausted" and the mortgagee may then proceed on the bond for the deficiency. "Indeed the sum realized upon such a sale would be less by reason of the undivided nature of the tenure." *Deal Park Co. v. Bannard, supra*, at 195. "The failure to make the

40 tenant a party may prevent the property from

Opinion of Court of Errors and Appeals.

bringing the best possible price on the foreclosure sale." 42 Corpus Juris, page 59, cited with approval in *Guardian Life Insurance Co. vs. Lowenthal, supra*, at page 851. "Be that as it may, it appears a complete sale was not effected and therefore the price obtained was not, possibly, the best price." *Chodosh vs. Schlesinger, supra*, at page 609. See also the *Liotta case, supra*, at page 472. 10

Therefore it may be said that the mortgagee did exhaust his security in compliance with the statute if he 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 deed, or otherwise. 20

In the instant case, the plaintiff alleges in his reply that a purchaser would secure complete possession, and by his supporting affidavits attempts to prove it. The affidavit of the local real estate expert states—"It is my opinion as a real estate expert that the occupancy of the one apartment by the tenant Brown could not and did not affect the vendible value of the property on the date of the sale." He then goes on to give his reasons, one of them being that the announcement by the plaintiff's attorney at the sheriff's sale that the premises were being sold free of tenancies and that possession would be delivered with the deed "induces the free and unrestricted bidding by those persons who desire to buy the property free of the rights of tenants, for they assume the truth of the representation involved in the announcement and they bid on the assumption that 30 40

Order on Reversal of Judgment and Remittitur.

10 if and when the sale is confirmed and a sheriff's deed delivered, possession will accompany the deed." The allegations of the reply supported by affidavits may or may not be true. However, we are of the opinion that they raised an issue of fact as to whether the presence of this tenancy under the surrounding circumstances did affect the vendible value of the mortgaged premises by deterring bidders. Since reasonable men might differ as to the answer, it became a question for the trier of facts.

The judgment is, therefore, reversed and cause remanded for further proceedings in conformity with this opinion.

20

Order for Reversal and Remittitur.NEW JERSEY COURT OF ERRORS
AND APPEALS.

No. 76, October Term, 1937.

30

HARVESTER BUILDING & LOAN
ASSOCIATION OF NEWARK, N. J.,
Plaintiff-Appellant,

vs.

HANA ELBAUM and
SIMON ELBAUM,
Defendants-Respondents.

Order on
Reversal of
Judgment
and Remittitur.

40

This cause having been duly argued both orally and on briefs, at the October Term, 1937, of this

Order on Reversal of Judgment and Remittitur.

Court, by Leber & Ruback, Esqs., of counsel for the appellant, and Simon M. Seley, Esq., of counsel for the respondents, and the Court having inspected the record and judgment below and having considered the grounds of appeal:

It is, thereupon, on this 9th day of February, 1938, ORDERED that the judgment of the Essex County Circuit Court in favor of the defendants and against the plaintiff, being the judgment brought up by the within appeal, be in all things reversed, set aside and for nothing holden, and that the record and proceedings be remitted to the said Essex County Circuit Court to be proceeded with in accordance with this judgment and the practice of the said Court. 10

Entered February 9th, 1938, on motion of 20

LEBER & RUBACK,
Attorneys of Plaintiff-Appellant.

30

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Rejoinder.

ESSEX COUNTY CIRCUIT COURT.

10	HARVESTER BUILDING AND LOAN ASSOCIATION OF NEWARK, N. J., a New Jersey corporation, Plaintiff,	}	Action at Law. Rejoinder.
	<i>vs.</i>		
	HANA ELBAUM and SIMON ELBAUM, Defendants.		

20 Defendants, Hana Elbaum and Simon Elbaum
 by way of rejoinder to the plaintiff's reply say:

30 1. They admit the allegations of paragraph
 No. 3 of the said reply with respect to the dates
 of filing of the bill of complaint and *lis pendens*
 in the foreclosure action, the date of the Sheriff's
 sale, the date of confirmation and the date of the
 delivery of the Sheriff's deed. They further admit
 the description of the mortgaged premises, that
 the said premises were vacant at the time of the
 filing of the *lis pendens* and the letting of the same
 on August 22nd, 1935, to Louis Brown. All other
 allegations of paragraph 3 are denied.

2. They deny the allegations of paragraph No.
 4 of the said reply.

SIMON M. SELEY,
 Attorney for Defendants.

Demand for Payment of Taxed Costs.NEW JERSEY COURT OF ERRORS
AND APPEALS.

No. 76, October Term, 1937.

HARVESTER BUILDING & LOAN ASSOCIATION OF NEWARK, N. J., Plaintiff-Appellant,	}	Demand for Payment of Taxed Costs.
<i>vs.</i>		
HANA ELBAUM and SIMON ELBAUM, Defendants-Respondents.		

10

*To the Aboved Named Defendants or Simon M.
Seley, Their Attorney:*

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Attached hereto is a true copy of the bill of taxed costs in the above entitled appeal. TAKE NOTICE that the plaintiff demands that said costs be paid forthwith and that in default thereof execution will issue therefor against the defendants.

Yours truly,

30

LEBER & RUBACK,
Attorneys for Plaintiff-Appellant.

Dated—May 6, 1938.

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*Demand for Payment of Taxed Costs.*NEW JERSEY COURT OF ERRORS
AND APPEALS.

10	HARVESTER BUILDING & LOAN ASSOCIATION OF NEWARK, N. J., Plaintiff-Appellant, <i>vs.</i> HANA ELBAUM and SIMON ELBAUM, Defendants-Respondents.	On Appeal from Essex Circuit Court. Cost of Appellant.
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	May Term, 1937	A. & C.	Clk.
20	Retaining fee and warrant of attorney, copy and filing.....	\$ 1.17	\$.12
	Motion for appearance and entg. rule	2.30	.32
	Filing return12
	Term fee	1.60	
	Vac. and Oct. Term, 1937.		
	Notice of hearing, copy and service, entg. and filing.....	.45	.32
	Motion for hearing and setting down cause80	.38
30	Attendance on motion for hearing	1.50	
	Printing Case & Brief.....	154.40	
	Motion for order reversing judgment	1.50	.20
	Drawing and eng. decree, entg. and copy, recdg., remittitur, filing and seal, 4 fo.	1.20	2.36
	Breviat and copy, argument fee on final hearing, A. & C.....	6.54	
40	Term fee	1.60	

Demand for Payment of Taxed Costs.

May Term, 1937	A. & C.	Clk.	
Filing check list.....		.12	
Drawing and eng. costs, taxing, filing and copy.....		1.94	
	<u>173.06</u>	<u>5.88</u>	
	5.88		10
	<u>\$178.94</u>		

I tax this bill of costs at One Hundred Seventy-three Dollars and Six Cents.

THOMAS A. MATHIS,
Clerk.

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Service of the within Demand is hereby acknowledged this 6th day of May, 1938.

SIMON M. SELEY,
Attorney for Defendants-Respondents.

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Notice of Motion.

ESSEX COUNTY CIRCUIT COURT.

10	<p style="text-align: center;">HARVESTER BUILDING & LOAN ASSOCIATION OF NEWARK, N. J., a New Jersey corporation, Plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">HANA ELBAUM and SIMON ELBAUM, Defendants.</p>	<p>Action at Law. Notice of Motion.</p>
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20 *To the Above Named Defendants or Simon M. Seley, Esq., Their Attorney:*

30 PLEASE TAKE NOTICE that on Friday, the 13th day of May, 1938, at 10 A. M. (Daylight Saving Time), or as soon thereafter as the matter can be heard, we shall move before the Honorable William A. Smith, Judge of the Essex County Circuit Court, at the Court House, in the City of Newark, for an order vacating and setting aside the judgment heretofore entered in this cause in favor of the defendants and against the plaintiff. Our said motion will be based on the ground that by order of the New Jersey Court of Errors and Appeals, entered on February 9, 1938, it was ordered that the said judgment be in all things reversed, set aside and for nothing holden. In support of said motion we shall rely on said order on reversal, a true copy whereof is hereto annexed.

40 TAKE FURTHER NOTICE that at said time and place we shall move for the entry of final judg-

Notice of Motion.

ment in favor of the plaintiff and against the defendants on the ground that by the pleadings and proofs constituting the record in this case it appears that the defendants are without legal defense to the action and that their answer herein is both sham and frivolous. In support of our said motion we will rely upon the pleadings in this cause and upon the affidavits used in support of our earlier motion to strike the defendants' answer and for the entry of summary judgment, as well as the affidavits used by us in opposition to the defendants' motion to strike the plaintiff's reply and for the entry of summary judgment. 10

Yours truly,

LEBER & RUBACK, 20
Attorneys for Plaintiff.

Dated—May 6, 1938.

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Notice of Motion for Disallowance of Costs.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

No. 76, October Term, 1937.

10

HARVESTER BUILDING & LOAN
ASSOCIATION OF NEWARK, N. J.,
Plaintiff-Appellant,

vs.

HANA ELBAUM and
SIMON ELBAUM,
Defendants-Respondents.

Notice of
Motion for
Disallowance
of Costs.

20

*To Leber & Ruback, Attorneys for Plaintiffs-
Appellants.*

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TAKE NOTICE that the defendants-respondents will apply to the Court of Errors and Appeals, at Trenton on Tuesday, May 17, 1938, or as soon thereafter as counsel can be heard, for a disallowance of costs taxed in the above matter, or in the alternative, for an order that costs abide the event, on the ground that the reversal of the judgment below was due to a mistake made by the trial judge and does not finally determine any issue between the parties. As a basis for said motion defendants-respondents will rely on the opinion of the Court in the above entitled cause.

SIMON M. SELEY,
Attorney for Defendants-Respondents.

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Service of the within Notice is hereby acknowledged this 7th day of May, 1938.

LEBER & RUBACK,
Attorneys for Plaintiff-Appellant.

Order.

(Filed June 1, 1938.)

NEW JERSEY COURT OF ERRORS
AND APPEALS.

No. 76, October Term, 1937.

 HARVESTER BUILDING AND LOAN
ASSOCIATION OF NEWARK, N. J.,

Plaintiff-Appellant,

*vs.*HANA ELBAUM and SIMON
ELBAUM,Defendants-Respondents.

 On Motion for
Disallowance
of Costs.

Order.

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This matter having come on to be heard on motion for disallowance of costs, or in the alternative, for an order that costs abide the event, and the court having considered the briefs of Simon M. Seley, of counsel with respondents, and Leber & Ruback, of counsel with appellant;

It is thereupon on this 23rd day of May, 1938, ordered that the taxed costs be struck and it is further ordered that costs on appeal in this cause shall abide the event.

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Entered June 1st, 1938, on motion of

 SIMON M. SELEY,
Attorney for Defendants-Respondents.

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Order.

ESSEX COUNTY CIRCUIT COURT.

10	<p style="text-align: center;">HARVESTER BUILDING & LOAN ASSOCIATION OF NEWARK, N. J., a New Jersey corporation, Plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">HANA ELBAUM and SIMON ELBAUM, Defendants.</p>	} Action at Law. Order.
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20 Plaintiff having moved to strike the defendants' Answer as sham and frivolous and having further moved for summary judgment in favor of the plaintiff, and it appearing from an inspection of the record that heretofore plaintiff filed a Reply to said Answer, and the Court being of opinion that the present motion is unseasonably made;

It is, on this 20th day of May, 1938, ORDERED that said motion be and the same is hereby denied without prejudice to its renewal at the trial of the action, and

30 It is further ORDERED that the action be placed for trial peremptorily on the commercial calendar for June, 1938, subject, however, to the plaintiff's right to move at or before the trial to strike the defendants' rejoinder filed herein as being both sham and frivolous.

WM. A. SMITH,
Judge.

Notice of Trial.

ESSEX COUNTY CIRCUIT COURT.

HARVESTER BUILDING & LOAN
ASSOCIATION OF NEWARK, N. J.,
a New Jersey corporation,

Plaintiff,

vs.

HANA ELBAUM and

SIMON ELBAUM,

Defendants.

Action at Law. 10
Notice of
Trial for the
Commercial
Calendar.

To Simon M. Seley, Esq., Attorney of Defendants:

Sir:

PLEASE TO TAKE NOTICE, that the trial on the commercial calendar of the issue joined in this cause will be moved before said Court, in the presence of such Judge or Justice thereof, as shall then be holding said Court, on the 6th day of June, A. D. 1938, at the Court House, in the City of Newark, in and for the County of Essex, at ten o'clock in the forenoon, or as soon thereafter as the said Court can attend to the same. This notice is given subject to the reserved right to move to strike the Rejoinder and to enter judgment final for the plaintiff.

Dated May 25th, A. D. 1938.

Your obedient servants,

LEBER & RUBACK,
Attorneys of Plaintiff.

Service of the within Notice of Trial is hereby acknowledged this 25th day of May, A. D. 1938.

SIMON M. SELEY,
Attorney of Defendants.

Notice of Motion to Strike Rejoinder, etc.

ESSEX COUNTY CIRCUIT COURT.

10	HARVESTER BUILDING & LOAN ASSOCIATION OF NEWARK, N. J., a New Jersey corporation, Plaintiff, <i>vs.</i> HANA ELBAUM and SIMON ELBAUM, Defendants.	} Action at Law. Notice of Motion to Strike Rejoinder, etc.
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Simon M. Seley, Esq., Attorney for Defendants:

20 TAKE NOTICE that on Friday, the 3rd day of June, 1938, at 10 A. M. (Daylight Saving Time), or as soon thereafter as the matter can be heard, at the Court House, in the City of Newark, we shall apply to the Honorable William A. Smith, Circuit Court Judge, or to such other Judge as shall then be hearing motions, to strike the defendants' Rejoinder on the following grounds:

- 30
1. Said Rejoinder is sham.
 2. Said Rejoinder is frivolous and presents no legal answer to the matter set up in plaintiff's reply.
 3. Said Rejoinder discloses no matter of legal defense.

TAKE FURTHER NOTICE that in support of the ground of shamness we shall rely on the affidavits hereto attached.

40 TAKE FURTHER NOTICE that if our said motion is granted we shall at the same time and place

Notice of Motion to Strike Rejoinder, etc.

move for judgment final in favor of the plaintiff and against the defendants on the ground that the decision of said motion is decisive of the whole case.

TAKE FURTHER NOTICE that at said time and place we shall also move to strike the defendants' Answer herein on the grounds that said Answer is both sham and frivolous, and for the entry of summary judgment in favor of the plaintiff and against the defendants. In support of that motion we shall rely on the affidavits of Max M. Albach, Herman Riecke and Nathan Perselay, hereto attached. 10

Yours truly,

LEBER & RUBACK, 20
Attorneys for Plaintiff.

Dated—May 27, 1938.

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Affidavit of Max M. Albach.

ESSEX COUNTY CIRCUIT COURT.

10	HARVESTER BUILDING & LOAN ASSOCIATION OF NEWARK, N. J., a New Jersey corporation, Plaintiff, <i>vs.</i> HANA ELBAUM and SIMON ELBAUM, Defendants.	Action at Law. On Motion to Strike, etc. Affidavit.
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20 STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } ss.:

MAX M. ALBACH, of full age, being duly sworn according to law, on his oath deposes and says:

I am associated with Leber & Ruback, attorneys for the plaintiff above named, who were also the solicitors in Chancery of the said above named plaintiff in a foreclosure suit wherein it was complainant and the said Hana Elbaum and Simon Elbaum and others were defendants, in which

30 the premises mentioned and described in the within action were foreclosed. I was in charge of said foreclosure proceedings and am familiar with all the details relating thereto. The bill in said foreclosure cause was filed on the 20th day of July, 1935, in the office of the Clerk of the Court of Chancery, at Trenton, N. J., and thereafter, on the 23rd day of July, 1935, I filed a *lis pendens* in the office of the Register of the County of Essex, as required by the statute in

40 such case made and provided. I attended the Sheriff's sale in the said matter held on the 31st

Affidavit of Max M. Albach.

day of March, 1936 and at said Sheriff's sale and before the bidding for the said property commenced and before the said property was actually cried off I publicly announced in the presence of all bidders attending the sale that the said premises were being sold subject only to taxes and assessments unpaid and a lien against the said premises and such state of facts as an accurate survey would disclose and were being sold free of all tenancies or rights of tenants in the premises. I further announced that with the Sheriff's deed would go the possession of the property in question. Such announcement was read by me from a prepared statement, whereof the following is a true copy:

10

"March 31, 1936.

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To the Sheriff of Essex County:

Re. Harvester B. & L. Assn. v.
Albert Hollander *et als.*

The within premises are sold subject only to taxes and assessments unpaid and a lien against said premises and such state of facts as an accurate survey would disclose and are specifically sold free of all tenancies or rights of tenants in the property and possession will be given upon delivery of the Sheriff's deed."

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It has been my steady practice for many years to present and read at Sheriff's sales a statement of the liens and other conditions, subject to which the purchaser buys and will accept title. This practice is general in Essex County and it is the fixed custom of the Sheriff before taking the first bid to ask complainant's counsel what further encumbrances there are.

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Affidavit of Max M. Albach.

10 The sale was confirmed on April 11, 1936 and the Sheriff's deed was actually delivered on May 5, 1936. By said last mentioned date the premises in question were entirely vacant, the tenant Louis Brown, together with his wife, Agnes Brown, having previously vacated the apartment so as aforesaid occupied by him.

Before filing the bill of complaint in the above mentioned foreclosure action and again after the filing of the lis pendens, I visited the premises in question and found the said premises entirely vacant and untenanted.

MAX M. ALBACH.

20 Sworn and subscribed to before me }
this 27th day of May, 1938. }

SADIE HAUSMAN,
Notary Public of N. J.

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Affidavit of Herman Rieke.

ESSEX COUNTY CIRCUIT COURT.

HARVESTER BUILDING & LOAN
ASSOCIATION OF NEWARK, N. J.,
a New Jersey corporation,
Plaintiff,

vs.

HANA ELBAUM and
SIMON ELBAUM,
Defendants.

Action at Law. 10
On Motion to
Strike, etc.
Affidavit.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

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HERMAN RIEKE, being duly sworn according to law, on his oath deposes and says:

I am Assistant Treasurer of the Harvester Building & Loan Association of Newark, N. J., the above named plaintiff, and I am in charge of the management of the property of said Association, including premises at No. 39 Elizabeth Avenue, Newark, N. J., being the premises referred to in the complaint filed in the within action encumbered by the plaintiff's mortgage, securing the bond on which the within suit is brought. I take care of the renting of the plaintiff's property and of the dispossession of tenants therefrom and I was in such charge during the entire period of time herein mentioned and referred to.

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The premises in question are a two-family frame dwelling house located at the above address. The said premises became vacant in May, 1935, the tenants previously occupying the premises having either moved or been dispossessed.

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Affidavit of Herman Rieke.

The said premises continued to remain vacant and untenanted in their entirety from May, 1935 until September 1, 1935. On July 23, 1935, being the date on which I am informed the lis pendens was filed in the foreclosure action then pending in Chancery of New Jersey, wherein Harvester Building & Loan Association of Newark, N. J., was the complainant, and Hana Elbaum and Simon Elbaum and others were defendants, which foreclosure action is referred to in the plaintiff's complaint filed herein, the said premises were uninhabited nor was there outstanding any leasehold or tenancy interest therein.

Some time prior to May 1, 1935, the Board of Directors of the Harvester Building & Loan Association, the plaintiff above named, passed a resolution to take possession of the property, and under the authority of said resolution I took possession of said property for said Harvester Building & Loan Association and it became thereby a mortgagee in possession. The tenants then in the said premises were not paying any rent and I had them vacate the premises. Thereafter, on August 22, 1935, being approximately one month after the filing of the lis pendens in the said foreclosure proceedings, I rented the said premises for the said Harvester Building & Loan Association, as mortgagee in possession, to one Louis Brown as a monthly tenant at a monthly rent of \$25.00, said monthly tenancy to commence on September 1, 1935. Said Louis Brown, together with his wife, took possession of the said premises on September 1, 1935.

On March 1, 1936 I served a one month's notice terminating the tenancy between the plaintiff and said Louis Brown and requiring him to quit the said premises and to vacate therefrom on April

Affidavit of Herman Riecke.

1, 1936. He actually did vacate the premises during the first week in April, 1936. The said Louis Brown in an affidavit verified on July 23, 1936 and filed in the above entitled cause stated that he moved into the premises on September 1, 1935 and remained there until May 1, 1936. At the time of the Sheriff's sale held in the said foreclosure proceeding the Sheriff of Essex County was in a position to sell and did in fact sell to the purchaser of the said premises the full and complete title to the said property, free and clear of any tenancies or tenancy or leasehold interest in the mortgaged premises. With the Sheriff's deed thereafter on May 5, 1936 delivered, there actually passed to the grantee the possession of said premises in their entirety, the said premises being then entirely vacant and untenanted.

HERMAN RIECKE.

Sworn and subscribed to before me }
 this 27th day of May, 1938. }

SADIE HAUSMAN,
 Notary Public of N. J.

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Affidavit of Nathan Perselay.

ESSEX COUNTY CIRCUIT COURT.

10	<p>HARVESTER BUILDING & LOAN ASSOCIATION OF NEWARK, N. J. a New Jersey corporation, Plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> <p>HANA ELBAUM AND SIMON ELBAUM, Defendants.</p>	<p>Action at Law. On Motion to Strike, etc. Affidavit.</p>
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20 STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

NATHAN PERSELAY, of full age, being duly sworn according to law, on his oath deposes and says:

I am the Secretary of Harvester Building & Loan Association of Newark, N. J., the plaintiff in the above entitled action, and I am acquainted with its business and fiscal affairs.

30 Said Association is possessed of the cause of action for the deficiency set forth in the complaint filed by it in the above action. It is the holder of the bond dated January 8, 1926, made unto it by the defendants, Hana Elbaum and Simon Elbaum, conditioned for the payment of the principal sum of \$14,000. with interest at 6% per annum. The payment of said bond was collaterally secured by the mortgage mentioned in the complaint herein, which mortgage was foreclosed by suit in the Court of Chancery of New Jersey, wherein a Final Decree was entered on January 9, 1936, adjudging

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Affidavit of Nathan Perselay.

there was due on said bond and mortgage the sum of \$14,268.94, together with interest from December 26, 1935 and the taxed costs of said suit amounting to a further sum of \$341.94.

By virtue of a writ of fi. fa. directed by said Decree to be issued the mortgaged premises were sold at public sale on March 31, 1936 for the sum of \$100. which sale was thereafter on April 11, 1936 confirmed by the Order of the Chancellor of the State of New Jersey.

On said date of sale there was due to the plaintiff herein on said bond the following sums:

Amount adjudged by the Decree . . .	\$14,268.94	
Interest on Decree to date of Sheriff's sale	225.91	
Taxed costs	341.94	20
Interest on taxed costs	4.28	
Sheriff's fees	67.34	
	<hr/>	
	\$14,908.41	
	<hr/>	

After crediting against the foregoing indebtedness the sum of \$100. realized at said Sheriff's sale there remained due from the defendants to the plaintiff on said bond the sum of \$14,808.41. No part thereof has been paid and there is due on said bond from the defendants to the plaintiff on the day of the making of this affidavit the aforementioned indebtedness of \$14,808.41 together with interest at 6% per annum computed from March 31, 1936.

There are no credits, set-offs or counterclaims against the foregoing indebtedness to which the defendants may be entitled and the full indebted-

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Affidavit of Nathan Perselay.

ness of \$14,808.41, with interest to be computed as
aforesaid, is justly due and owing.

NATHAN PERSELAY.

10 Sworn and subscribed to before me }
this 27th day of May, 1938. }

LYDIA M. SEAMAN,
Notary Public, State of New Jersey.

(Seal)

Service of the within Notice of Motion is hereby
acknowledged this 27th day of May, 1938.

20

SIMON M. SELEY,
Attorney for Defendants.

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**Reply Affidavits on Motion to Strike
Rejoinder, etc.**

Affidavit of Agnes Brown.

ESSEX COUNTY CIRCUIT COURT.

HARVESTER BUILDING AND LOAN
ASSOCIATION OF NEWARK, N. J.

Plaintiff-Appellant,

vs.

HANA ELBAUM AND
SIMON ELBAUM,
Defendants-Respondents.

Action at Law.
Reply Affidavit
On Motion to
Strike
Rejoinder, etc.

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STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss. :

20

AGNES BROWN, of full age, being duly sworn according to law, upon her oath deposes and says:

I have read the affidavit of Herman Rieke filed in support of this motion. As stated therein my husband and I rented the premises at 39 Elizabeth Avenue, Newark, New Jersey, from Mr. Rieke on or about August 22nd, 1935, for \$25.00 per month, our tenancy to commence on September 1st, 1935.

30

On September 1st, 1935, I moved into the apartment with my husband, Louis Brown, and my children.

I deny the statement made by Mr. Rieke that he served a one month notice to quit on March 1st, 1936. Such a notice was served on us but not until the early part of April, 1936, a short while before Easter. At that time Mr. Rieke delivered the notice to us but told us not to pay any attention to it.

40

Affidavit of Simon Elbaum.

However, we decided to move and actually vacated the apartment on or about May 1st, 1936. We paid rent for the apartment to the Harvester Building and Loan Association to and including the month of April, 1936.

AGNES BROWN.

10

Subscribed and sworn to before }
me this 3rd day of June, 1938. }

BENJAMIN L. STEEN,
An Attorney at Law of New Jersey.

Affidavit of Simon Elbaum.

20

ESSEX COUNTY CIRCUIT COURT.

HARVESTER BUILDING AND LOAN
ASSOCIATION OF NEWARK, N. J.

Plaintiff-Appellant,

vs.

HANA ELBAUM AND
SIMON ELBAUM,

Defendants-Respondents.

Action at Law.
Reply Affidavit
On Motion to
Strike
Rejoinder, etc.

30

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } SS.:

SIMON ELBAUM, of full age, being duly sworn according to law, upon his oath deposes and says:

40

Affidavit of Simon Elbaum.

I am one of the defendants in the above entitled action. My wife, Hana Elbaum, is the other defendant. We were not served with a subpoena and ticket in the foreclosure action out of which this deficiency suit arises until November 6th, 1935. The subpoena was dated October 29th, 1935.

I am informed by my attorney, Simon M. Seley, that I have a just and legal defense in this action and therefore deny that there are any moneys due and owing from me or my wife, Hana Elbaum, to the Harvester Building and Loan Association. 10

SIMON ELBAUM.

Subscribed and sworn to before }
me this 2nd day of June, 1936. } 20

BENJAMIN L. STERN,
An Attorney at Law of New Jersey.

30

40

Affidavit of Alfred R. Kemper.

ESSEX COUNTY CIRCUIT COURT.

10	HARVESTER BUILDING & LOAN ASSOCIATION OF NEWARK, N. J., Plaintiff, <i>vs.</i> HANA ELBAUM and SIMON ELBAUM, Defendants.	}	Action at Law. Affidavit.
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STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } ss.:

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ALFRED R. KEMPER, of full age, being duly sworn according to law, upon his oath deposes and says:

I am in the real estate business and am associated with the firm of Albert M. Greenfield & Co., realtors. My work consists of managing, appraising and selling real estate and I am familiar with market conditions and market values of real estate in Newark and vicinity.

30

I am informed that, at the time of the foreclosure sale in the above matter, a tenant named Brown, who was not a party to the foreclosure, was in possession of one of the apartments in the property, that he was a monthly tenant, that a notice to quit on April 1, 1936, the day following the Sheriff's sale, had been served upon him, that an announcement was made at the Sheriff's sale that the premises were being sold free of tenancies and that possession would be delivered

40

with the deed. It is my opinion as a real estate

Affidavit of Alfred R. Kemper.

expert that the occupancy of the mortgaged premises by Brown did affect the vendible value of the property on the date of the sale, for the following reasons:

1. The section of Elizabeth Avenue in which this property is located is developing into a purely business neighborhood. It is likely that many prospective purchasers of the premises in question would desire to convert them in business property and hence would require immediate and complete possession. 10

2. The failure to cut off an interest in the premises by foreclosure, no matter how small that interest may be, is an absolute deterrent to careful bidders. While it is true that in this case it might have been possible to evict the tenant speedily and simply, it was also possible that troublesome litigation would arise if he should prove recalcitrant. Intelligent real estate bidders avoid buying lawsuits. 20

3. The announcement at the sale, in my opinion, was of little importance. Some people, recognizing it as an unusual announcement, might thereby scent trouble and be further deterred from bidding. 30

ALFRED KEMPER.

Subscribed and sworn to before }
me this 12th day of May, 1938. }

BENJAMIN L. STERN,
An Attorney at Law of
New Jersey.

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**Order Striking Out Rejoinder and for
Entry of Judgment.**

ESSEX COUNTY CIRCUIT COURT.

10	HARVESTER BUILDING & LOAN ASSOCIATION OF NEWARK, N. J., a New Jersey corporation, <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> HANA ELBAUM and SIMON ELBAUM, <p style="text-align: right;">Defendants.</p>	} Action at Law. } On Motion to } Strike } Rejoinder and } to Enter Final } Judgment. } } Order Striking } Out Rejoinder } and for Entry } of Judgment.
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20 This matter coming on to be heard in the pres-
 ence of Meyer E. Ruback, Esq., of Leber & Ru-
 back, attorneys for the plaintiff, and Simon M.
 Seley, Esq., attorney for the defendants, and upon
 plaintiff's notice of motion to strike defendants'
 Rejoinder on the following grounds, viz: (1) that
 said Rejoinder is sham, and (2) that said Rejoinder
 is frivolous and presents no legal answer to
 the matter set up in plaintiff's Reply, and (3)
 that said Rejoinder discloses no matter of legal
 30 defense; and the Court having read and consid-
 ered the plaintiff's affidavits in support of said
 motion and the defendants' affidavits filed in op-
 position thereto, and being of opinion that said
 Rejoinder is sham and frivolous and presents no
 legal answer to the matter set up in plaintiff's
 Reply and discloses no matter of legal defense;
 and it further having been alleged in plaintiff's
 Reply and established by plaintiff's affidavits that
 40 at the sheriff's vendue held on March 31, 1936
 and before the bidding commenced the plaintiff
 caused an announcement to be read to all bidders

Judgment Record.

ESSEX COUNTY CIRCUIT COURT.

71097.

HARVESTER BUILDING AND LOAN ASSOCIATION OF NEWARK, N. J. a New Jersey Corporation, Plaintiff, <i>vs.</i> HANA ELBAUM and SIMON ELBAUM, Defendants.

10
 Action at Law.
 On Order
 Striking Out
 Rejoinder By
 Order of the
 Court.

Judgment Entered June 7, 1938. 20

Damage	\$14,808.41
Int.	1,939.89
Costs	89.63
Total	<u>\$16,837.93</u>

JUDGE WILLIAM A. SMITH.

Leber & Ruback, Attys. of Plaintiff.

This Action came before Judge William A. Smith on motion at the Essex Circuit Court on June 6, 1938. 30

Motion being made to strike defendants' Rejoinder on the following grounds, viz: (1) that said Rejoinder is sham and (2) that said Rejoinder is frivolous and presents no legal answer to the matter set up in plaintiff's reply and (3) that said Rejoinder discloses no matter of legal defense.

40

Judgment Record.

The Court thereupon Order that the defendants' said Rejoinder be and the same is hereby stricken out as sham and frivolous.

10 Whereupon it is adjudged that judgment be entered in favor of the plaintiff Harvester Building and Loan Association, of Newark, N. J. a New Jersey corporation and against the defendants Hana Elbaum and Simon Elbaum for the sum of Fourteen Thousand Eight Hundred Eight Dollars and Forty-one Cents (\$14,808.41) with interest thereon computed at 6% per annum from March 31, 1936 amounting to the further sum of One Thousand Nine Hundred Thirty-nine Dollars and Eighty-nine Cents (\$1,939.89) making in all as damages the sum of Sixteen Thousand Seven Hundred Forty-eight Dollars and Thirty
20 Cents (\$16,748.30) and costs taxed at Eighty-nine Dollars and Sixty-three Cents, making in the whole the sum of Sixteen Thousand Eight Hundred Thirty-seven Dollars and Ninety-three Cents.

CHARLES W. PARKER,
J.

Notice of Appeal filed June 25, 1938.

30 Judgment signed June 6, 1938.

Judgment entered June 7, 1938.

Book 128, page 464, C. C. Judgments.

*Order Striking Out Rejoinder and for
Entry of Judgment.*

present that the mortgaged premises would be sold free of all tenancies or rights of tenants in the property and that possession would be given upon the delivery of the sheriff's deed, and that when said deed was delivered by the sheriff to the purchaser on May 5, 1936 there was delivered therewith actual and full possession of the entire mortgaged premises so sold at the sheriff's sale, said premises having been previously vacated by the tenant, Brown, and the foregoing facts not being denied or controverted by the defendants' affidavits on this motion: 10

It is, on this 6th day of June, 1938, ORDERED that the defendants' said Rejoinder be and the same is hereby stricken out as sham and frivolous; and the Court's determination on the questions raised by said pleadings and affidavits being decisive of the whole case, 20

It is further ORDERED that judgment final be entered in favor of the plaintiff, Harvester Building & Loan Association of Newark, N. J., and against the defendants, Hana Elbaum and Simon Elbaum, for the amount established by the affidavit of Nathan Perselay, plaintiff's secretary, filed herein, viz., for the sum of \$14,808.41, with interest thereon computed at 6% per annum from March 31, 1936, amounting to the further sum of \$1,939.89, making in all as damages the sum of \$16,748.30, and costs to be taxed. 30

WM. A. SMITH,
Circuit Court Judge.

Conclusions.

ESSEX COUNTY CIRCUIT COURT.

10	<p style="text-align: center;">HARVESTER BUILDING AND LOAN ASSOCIATION OF NEWARK, N. J., a corporation,</p> <p style="text-align: right; padding-right: 20px;">Plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">HANA ELBAUM and SIMON ELBAUM, Defendants.</p>	<p style="font-size: 4em; line-height: 1;">}</p> <p>Action at Law. Conclusions.</p>
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20 On motion to strike rejoinder and for summary judgment.

LEBER & RUBACK, attorneys for the plaintiff.

SIMON M. SELEY, attorney for defendants.

WILLIAM A. SMITH, Circuit Court Judge:

30 This is an action at law brought by a first mortgagee to recover a deficiency on a bond secured by a mortgage on real estate after foreclosure of the mortgage, the suit being instituted against the makers of the mortgage, who are Hana Elbaum and Simon Elbaum. The defendants have answered the complaint and admit all the allegations thereof except that there was anything due the plaintiff. They set up, however, one separate defense. This defense is that prior to the filing of the foreclosure bill Louis Brown and Agnes Brown were tenants in possession of the mortgaged premises and were not made parties to the foreclosure suit.

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Conclusions.

The effect of this failure as a defense is stated in the answer as follows:

“The complaint in the above entitled matter is, therefore, improperly brought and filed in law for the reason that the plaintiff, Harvester Building and Loan Association of Newark, as complainant in the foreclosure action, failed and neglected to make Louis Brown and Agnes Brown, the tenants as aforementioned, parties to the foreclosure proceeding with the result that their leasehold, interest and estate in the mortgaged premises was liberated from the effect of the foreclosure decree and their rights were not cut off or debarred thereby; and with the further result that the statute in such case made and provided (3 Comp. Stat. 3421; P. L. 1933, p. 172) which requires that the owner of a bond and mortgage must first exhaust his security before undertaking to sue on the bond, has not been complied with, and with the further result that the foreclosure sale was made and the purchaser took the mortgaged premises subject to the rights of the existing tenants and subject to their possession of the mortgaged premises and for said reasons there is no cause of action for a deficiency as alleged in the bill of complaint herein.”

It will be observed that the answer did not raise any defense that the existence of the tenancy and the possession of the tenants deterred bidders or otherwise adversely affected the vendible value of the property at the time of the foreclosure sale.

Conclusions.

A motion was made before a circuit court judge to strike out the answer on the ground that it presented no legal defense and was sham. The motion was supported by affidavits and the defendant also submitted affidavits on the motion.

10 The undisputed facts on this motion were that the plaintiff as mortgagee had taken possession of the mortgaged premises previous to the commencement of the foreclosure; that all tenants had vacated the premises previous to the commencement of the foreclosure, and that the premises were vacant at that time and at the time of the filing of the foreclosure *lis pendens*, which was on July 23, 1935; that the tenants Brown moved in on September 1, 1935 and held possession as monthly tenants under the mortgagee in
20 possession. The defendant's affidavit showed that the tenants moved out on May 1, 1936, although the right to remain there that long was disputed, as the plaintiff claimed a notice to vacate served March 1, 1936 requiring the tenants to vacate on April 1, 1936.

It was also undisputed that at the sheriff's sale held March 31, 1936 it was announced that the premises were sold free of all tenancies or rights of tenants in the property, and that the
30 right of possession would be delivered on the delivery of the sheriff's deed. The sale was confirmed April 11, 1936 and deed delivered May 5, 1936, after the tenant had moved out.

The motion to strike the answer was, however, denied by the Court, holding it was controlled by the decision of the Court of Errors and Appeals in *Italian Building and Loan Association v. Liotta*, 117 N. J. L. 467. (No appeal, of course, could be taken from this decision on the motion
40 to strike the answer, so the defendant filed a

Conclusions.

reply denying the allegations contained in the separate defense that the tenants Brown were in possession of the mortgaged premises prior to the commencement of the foreclosure but were put in possession by the plaintiff as mortgagee in possession after the commencement of the foreclosure.)

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The reply also set up the termination of the tenants' right to possession as of April 1, 1936 pursuant to a notice to vacate served on March 1, 1936; and also set up the announcement made at the sheriff's sale heretofore referred to.

The final paragraph of the reply also alleged that at the time of the sheriff's sale neither the vendible value of the mortgaged premises nor the bidding therefor was in any way lessened or affected by the circumstances of the tenancy.

20

Following the filing of the reply the defendant moved before the Circuit Court to strike out the reply on the ground that it was sham and on the ground that it was frivolous, and to enter summary judgment, basing the motion on the affidavit filed on the motion to strike the answer. The Circuit Court granted the motion to strike out the reply and ordered the entry of final judgment for the defendants, holding that the Liotta case hereinbefore referred to controlled and precluded a recovery in the action.

30

An appeal was taken from the determination of this Court, and the Court of Errors and Appeals in the case of *Harvester Building and Loan Association v. Elbaum*, 119 N. J. L. 437, reversed the determination of the Circuit Court and remitted the record, holding that the contention in the reply that the tenancy under the surrounding circumstances did not affect the vendible value of the mortgaged premises by deterring bidders,

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Conclusions.

raised an issue of fact, the Court in its opinion stating as follows:

10 “Now what is the purpose or reason for this statutory requirement to first ‘exhaust’ the security completely? We believe that this reason is a practical rather than a theoretical one. The legislative intent, as interpreted by the courts, shows a 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. If this is done, the property has been ‘exhausted’ and the mortgagee may then proceed on the bond for the deficiency. . .

20 “Therefore it may be said that the mortgagee did exhaust his security in compliance with the statute if he 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 deed, or otherwise.”

30 After the reversal of the Circuit Court and after the remitting of the record the defendants filed a rejoinder admitting the dates as alleged in the reply as to the filing of the bill of complaint *lis pendens* and the date of the sheriff’s sale and the confirmation and delivery of deed, and also admitting that the premises were let to Louis Brown on August 22, 1935, which is after the commencement of the foreclosure; and

40 the rejoinder denied all other allegations of paragraphs 2 and 3 of the reply.

Conclusions.

Motion is now made based on affidavits to strike out the rejoinder as sham, as frivolous, and as presenting no legal answer to the matters set up in the plaintiff's reply, and also as setting up no matters of legal defense. Notice was also given that the plaintiff would move for final judgment on the ground that the decision on the motion would be decisive of the whole case, and notice was also given that the plaintiff would move to strike out the answer on the ground that it was both sham and frivolous, and for entry of summary judgment.

10

I take it that if my determination on this motion is decisive of the whole case and there is no issue of fact involved I may direct summary judgment. The defendant has filed affidavits in resisting the plaintiff's motion.

20

In so far as the tenancy is concerned, the defendant does not dispute the fact that the tenant was a monthly tenant holding under the mortgagee and that his tenancy commenced on September 1, 1935. The affidavit denies the service of a month's notice to quit terminating the tenancy as of April 1, 1936, but admits the fact that the tenant vacated the premises on or about May 1, 1936, the sheriff's deed having been delivered May 5, 1936.

30

No denial is made by the defendants in their affidavits as to the fact that at the sheriff's sale an announcement was made that the premises would be sold free of the rights of tenants and delivery of possession would be made on delivery of the deed. I take it, therefore, that there is no issue of fact raised with regard to the fact that this announcement was made, and will accept it as true that it was made.

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Conclusions.

The defendants' affidavits allege that the subpenas in the foreclosure suit were not issued until after the tenant took possession. The only other matter set up by the defense is an affidavit of one Alfred R. Kemper, who says he is in the real estate business and claims familiarity with market conditions and values in Newark and vicinity. The affidavit then states as follows:

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"I am informed that at the time of the foreclosure sale in the above matter a tenant named Brown, who was not a party to the foreclosure, was in possession of one of the apartments in the property; that he was a monthly tenant; that a notice to quit on April 1, 1936, the day following the sheriff's sale, had been served upon him; that an announcement was made at the sheriff's sale that the premises were being sold free of tenancies, and that possession would be delivered with the deed. It is my opinion as a real estate expert that the occupancy of the mortgaged premises by Brown did affect the vendible value of the property on the date of the sale for the following reasons:

30
"1. The section of Elizabeth Avenue in which this property is located is developing into a purely business neighborhood. It is likely that many prospective purchasers of the premises in question would desire to convert them into business property and hence would require immediate and complete possession.

40
"2. The failure to cut off an interest in the premises by foreclosure, no matter how small that interest may be, is an absolute deterrent to careful bidders. While it is true

Conclusions.

that in this case it might have been possible to evict the tenant speedily and simply, it was also possible that troublesome litigation would arise if he should prove recalcitrant. Intelligent real estate bidders avoid buying law suits.

“3. The announcement at the sale, in my opinion, was of little importance. Some people, recognizing it as an unusual announcement, might thereby scent trouble and be further deterred from bidding.”

It will thus be seen that in opposition to the contention of the plaintiff as raised in the reply, neither the vendible value of the premises nor the bidding therefor was in any way lessened by the circumstances of the tenancy. No facts are presented by the defendants that any bidder or bidding was deterred by the circumstances with regard to the tenancy or the possession of the mortgaged premises, the contention merely being that the real estate expert's opinion is that the occupancy of the premises by Brown did affect the vendible value of the property on the date of the sale, and he gives his reasons therefor.

It is my view that the announcement at the sale was sufficient to dispose of any effects that the possession by a monthly tenant might have—any deterring effect on bidders or any effect of lessening the vendible value of the mortgaged premises at the date of the sale. I do not think expert testimony would be admissible to say that a bidder would be deterred by the presence of a tenant in the property where the purchaser would receive the property free and clear of such tenancy and would obtain possession of the property on

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Conclusions.

the delivery of the deed. He could rely on the announcement at the sale and would not be obliged to carry through his purchase if possession was not delivered to him on delivery of the deed.

10 It is also my view that the opinion of a real estate expert as to the effect that the fact that there was a tenant in possession at the time of the sale would have upon the bidding does not raise an issue of fact. Where the facts are not in dispute, as here, as to the circumstances surrounding the sale, it is for the Court to say whether or not the vendible value of the property was affected or whether or not the bidding would be deterred. Certainly the Court could not submit to a jury for their determination as an issue
20 of fact testimony pro and con of real estate experts as to the effect on the vendible value of the property and deterring bidders therefor on a sale thereof of the existence of a monthly tenancy of the property where the purchaser would receive the possession of the property on the delivery of the sheriff's deed. I therefore cannot see that there is any disputed issue of fact to submit to a jury; and the motion of the plaintiff should be granted.

30 In this determination I am mindful of the fact that the opinion of the Court of Errors and Appeals in this case in reversing the granting of the judgment for the defendants states:

40 "We are of the opinion that they (allegations of the reply) raised an issue of fact as to whether the presence of this tenancy under the surrounding circumstances did affect the vendible value of the mortgaged premises by deterring bidders."

Conclusions.

But the matter is in a different position presented now to me than it was as presented to the Court of Errors and Appeals. Since the determination by the upper court a rejoinder has been filed to the reply which, under the affidavit submitted, does not raise an issue as to any fact which might be in dispute but merely sets forth an opinion of a real estate expert as to the effect that the tenancy would have upon the vendible value of the property and the bidding at the sale. This, as I have stated, I do not think raises an issue of fact to submit to a jury. 10

It is also my view that a tenant who holds his tenancy under a mortgagee in possession has no greater rights than the mortgagee, and the foreclosure decree terminates the said tenant's right in the property, and he is subject to be ejected by writ of assistance issued in the foreclosure proceedings, and the purchaser under the sheriff's sale may be put in possession of the property. 20

August 11, 1938.

30

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Notice of Appeal and Grounds of Appeal.

ESSEX COUNTY CIRCUIT COURT.

10	<p>HARVESTER BUILDING & LOAN ASSOCIATION OF NEWARK, N. J., a New Jersey corporation, Plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> <p>HANA ELBAUM and SIMON ELBAUM, Defendants.</p>	<p>Action at Law. Notice of Appeal and Grounds of Appeal.</p>
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20 *To: Leber & Ruback, Esqs.,*
Attorneys for plaintiff:

Please take notice that the defendants appeal to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment and order entered in this cause, to wit:

30 1. Order entered in this cause, dated June 6, 1938, and filed June 7, 1938, striking out the defendants' rejoinder as sham and frivolous and further ordering that judgment final be entered in favor of the plaintiff and against the defendants in the sum of \$16,748.30, plus costs to be taxed.

40 2. The final judgment in this cause entered on June 7, 1938, in favor of the plaintiff and against the defendants in the sum of \$16,748.30, plus costs to be taxed.

Notice of Appeal and Grounds of Appeal.

The grounds of said appeal are:

- (1) The Circuit Court erred in holding that defendants' rejoinder was sham.
- (2) The Circuit Court erred in holding that defendants' rejoinder was frivolous.
- (3) The Circuit Court erred in striking defendants' rejoinder as sham and frivolous. 10
- (4) The Circuit Court erred in holding that its determination that defendants' rejoinder was sham and frivolous and should be struck as decisive of the whole case.
- (5) The Circuit Court erred in entering judgment final against defendants and refusing to permit the said cause to be submitted to a jury. 20
- (6) The Circuit Court erred in rendering judgment final against the defendants and in favor of the plaintiff.
- (7) The Circuit Court erred in denying to defendants a trial on the merits of the facts presented by their pleadings. 30
- (8) The Circuit Court erred in holding that there was no issue of fact, necessary to be submitted to a jury, raised on the answer and reply.
- (9) The Circuit Court erred in refusing to follow the opinion and judgment of the Court of Errors and Appeals in this cause with respect to the existence of an issue of fact upon the answer and reply. 40

Notice of Appeal and Grounds of Appeal.

(10) The Circuit Court entered judgment final against defendants without due process of law.

SIMON M. SELEY,
Attorney for and of Counsel
with Defendants.

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Dated: June 23, 1938.

Service of the within Notice and Grounds of Appeal is acknowledged this 23rd day of June, 1938.

LEBER & RUBACK,
Attorneys for Plaintiff.

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Appendix A.

SHERIFF'S DEED.

*To all persons to whom these presents shall come,
or whom they may concern:*

I, JAMES A. McRELL, Sheriff of the County of Essex, in the State of New Jersey, send Greeting: 10

WHEREAS on the 18th day of January, in the year of our Lord, One Thousand Nine Hundred and Thirty-six, a certain writ of *fieri facias* was issued out of the Court of Chancery of the State of New Jersey, directed and delivered to me, James A. McRell, then and still being Sheriff of the said County of Essex and which said writ is in the words or to the effect following, that is to say: 20

WHEREAS on the 9th day of January, in the year of our Lord, Nineteen Hundred and Thirty-six, by a certain decree made in our Court of Chancery before our Chancellor at Trenton, in a certain cause therein depending, wherein Harvester Building & Loan Association, of the City of Newark, New Jersey, a New Jersey corporation, is complainant and Albert Hollander and Nettie Hollander, his wife, Hana Elbaum and Simon Elbaum, her husband, Samuel F. Leber, Trustee of Guardian Trust Company of New Jersey in Liquidation, and Long Branch Banking Company, a corporation, are defendants, it was ordered, adjudged and decreed that certain mortgaged premises with the appurtenances in the bill of complaint in the said cause particularly set forth, and described that is to say: 30

ALL the following tract or parcel of land and premises hereinafter particularly described, sit- 40

Appendix A.

uate, lying and being in the City of Newark, in the County of Essex and State of New Jersey.

10 BEGINNING in the westerly line of Elizabeth Avenue at a point therein distant 475 feet southerly along the same from the intersection of said line with the southerly line of Clinton Avenue; from thence running westerly at right angles to Elizabeth Avenue 125 feet; thence southerly parallel with Elizabeth Avenue 25 feet; thence easterly and parallel with the first course 125 feet to said line of Elizabeth Avenue; thence northerly along the same 25 feet to the point of BEGINNING.

BEING the same premises conveyed to the said Hana Elbaum by deed dated January 8th, 1926.

20 TOGETHER with all and singular the rights, liberties, privileges, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversions and remainders, rents, issues and profits thereto, and also the estate, right, title, interest, use, property, claim and demand of the said defendants, of, in, to and out of the same, be sold, to pay and satisfy in the first place unto the said complainant, Harvester Building and Loan Association of Newark, New Jersey, a New Jersey corporation, the sum of Fourteen Thousand Two Hundred and Sixty-eight dollars and Ninety-four cents (\$14,268.94), the principal and interest secured by its certain mortgage given by Hana Elbaum and Simon Elbaum, her husband, recorded on the 9th day of January, 1926, in the Register's Office of Essex County, in Book—L 56 of Mortgages for said County on page 150, and bearing date the 8th day of January, 1926, together with lawful interest thereon from the 26th day of December, 1935, until the same be paid and satisfied and also the

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Appendix A.

costs of the said complainant; and that for that purpose a writ of *fieri facias* should issue, directed to the Sheriff of the County of Essex, commanding him to make sale as aforesaid, that the surplus money arising from such sale, if any there be, should be brought into the said Court, as by the said decree remaining as of record, in our said Court of Chancery, at Trenton, doth and may more fully appear. 10

AND WHEREAS the costs of the said complainant have been duly taxed at the sum of Three Hundred and Forty-one Dollars and Ninety-four Cents (\$341.94); therefore, you are hereby commanded, that you cause to be made of the premises aforesaid by selling so much of the same as may be needful and necessary for the purpose, the said sum of Fourteen Thousand, Two Hundred and Sixty-eight Dollars and Ninety-four Cents (\$14,268.94); and the same you do pay to the said complainant together with lawful interest thereon as aforesaid; and the sum aforesaid of costs; and that you have the surplus money, if any there be, before our said Chancellor in our Court of Chancery, aforesaid at Trenton on the 18th day of April, next, to abide the further order of our said Court according to the decree aforesaid. 20 30

AND you are to make return at the time and place aforesaid, by certificate under your hand, of the manner in which you shall have executed this our writ, together with this writ.

WITNESS, his Honor Luther A. Campbell, Esquire, our Chancellor, at Trenton, aforesaid, the 18th day of January, in the year of our Lord, Nineteen Hundred and Thirty-six. 40

LEBER & RUBACK,
Solicitors.

EDW. L. WHELAN,
Clerk.

Appendix A.

As by the record of the said writ of Fieri Facias in the Office of the Clerk of the said Court of Chancery, in Book O-19, of Executions, page 618, &c., may more fully appear.

10 AND WHEREAS, I, the said James A. McRell, as such Sheriff as aforesaid, did, in due form of law, advertise the said lot of land and premises to be sold under and by virtue of the said writ of Fieri Facias, at public vendue, to be held at the Court House in the City of Newark, on Tuesday, 10th day of March, A. D. 1936, at two o'clock in the afternoon of that day, by public advertisements signed by myself, and set up at five or more public places in the said County of Essex, one of which was in the Ward, where said real estate is situated, of the time and place appointed for such sale, for at least three weeks preceding the time appointed for said sale, and publishing the same in the "Newark Star-Eagle" and the "Italian Tribune," two of the newspapers printed and published in the said county, where the lands above described are situated, the same being designated for the publication by the laws of this State, and circulating in the neighborhood of said real estate, for at least once a week during four consecutive calendar weeks, the first publication being at least 21 days prior, and the last publication being not more than eight days prior to the time so appointed for selling the same, one of which said newspapers, to wit: "Newark Star-Eagle," is printed and published at Newark, the County seat of said County, at which time and place I did adjourn said sale regularly from week to week until Tuesday, March 31st, 1936, at the same hour and place, at which last mentioned time and place
20
30
40 I did accordingly offer and expose the said lot of

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land and premises for sale at public vendue under and by virtue of the said writ of Fieri Facias. And thereupon Harvester Building and Loan Association of Newark, New Jersey, a New Jersey corporation, of the City of Newark, County of Essex and the State of New Jersey, did bid for the same the sum of \$100.00; and no other person bidding as much, I did then and there, openly and publicly, in due form of law, between the hours of twelve and five in the afternoon, strike off and sell the said lot of land and premises, for the sum of \$100.00; to the said Harvester Building and Loan Association of Newark, New Jersey, a New Jersey corporation, it being then and there the highest bidder for the same, and the said sale having been confirmed by an order of the said Court of Chancery, dated the 11th day of April, A. D. 1936,

NOW THEREFORE, KNOW YE, THAT I, the said James A. McRell, as such Sheriff as aforesaid, under and by virtue of the said writ of Fieri Facias, and in execution of the power and trust in me reposed and also for, and in consideration of the sum of \$100.00 to me in hand paid, the receipt whereof I do hereby acknowledge, and therefrom acquit, exonerate and forever discharge the said Harvester Building and Loan Association of Newark, New Jersey, a New Jersey corporation, its successors and assigns, have granted, bargained, sold, assigned, transferred and conveyed, and by these presents do grant, bargain, sell, assign, transfer, and convey, unto the said Harvester Building and Loan Association of Newark, a New Jersey corporation, its successors and assigns, all and singular, the said lot of lands and premises, with the appurtenances, privileges, and

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hereditaments thereto belonging or in anyway appertaining.

10 TO HAVE AND HOLD the same unto the said Harvester Building and Loan Association of Newark, New Jersey, a New Jersey corporation, its successors and assigns, to its and their only proper use, benefit and behoof forever, in as full, ample and beneficial a manner as by virtue of the said writ of Fieri Facias may, can or ought to convey the same.

20 AND I, the said James A. McRell, for myself, my heirs, executors and administrators, do hereby covenant, promise and agree to and with the said Harvester Building and Loan Association of Newark, New Jersey, a New Jersey corporation, its successors and assigns, that I have not, as such Sheriff as aforesaid, done or caused, suffered or procured to be done, any act, matter or thing, whereby the estate hereby intended to be conveyed in and to the said lot of land and premises, with appurtenances, is, may or can be changed, charged, encumbered, or defeated in any manner whatever.

30 IN WITNESS WHEREOF, I, the said James A. McRell, as such Sheriff as aforesaid, have hereunto set my hand and seal this 11th day of April in the year of our Lord, Nineteen Hundred and Thirty-six.

JAMES A. McRELL,
Sheriff. (Seal)

Signed, sealed and delivered in the }
presence of }

40 EDWARD FENIAS.

Appendix A.

NEW JERSEY, }
 ESSEX COUNTY. } ss.:

I, JAMES A. McRELL, Sheriff of the County aforesaid, do solemnly swear that the land and real estate described in this deed, made by me to Harvester Building and Loan Association of Newark, New Jersey, a New Jersey corporation, of the City of Newark, County of Essex and the State of New Jersey, was by me sold by virtue of a good and subsisting execution, as is therein recited, that the money ordered to be made has not been, to my knowledge or belief, paid or satisfied, that the time and place of sale of the said land and real estate was by me duly advertised, as required by law, and that the same was cried off and sold to a bona fide purchaser for the best price that could be obtained.

JAMES A. McRELL,
 Sheriff.

Sworn before me, one of the Masters in Chancery of the State of New Jersey, on this 17th day of April in the year of our Lord, Nineteen Hundred and Thirty-six, and I have examined the deed above mentioned, do approve the same and order it to be recorded as a good and sufficient conveyance of the land and real estate therein described.

EDWARD FENIAS,
 Master in Chancery of New Jersey.

Received in the Office July 1st, A. D. 1936, at 10:02 A. M. Recorded at the request of Leber and Ruback.

THE HISTORY OF THE
CITY OF BOSTON

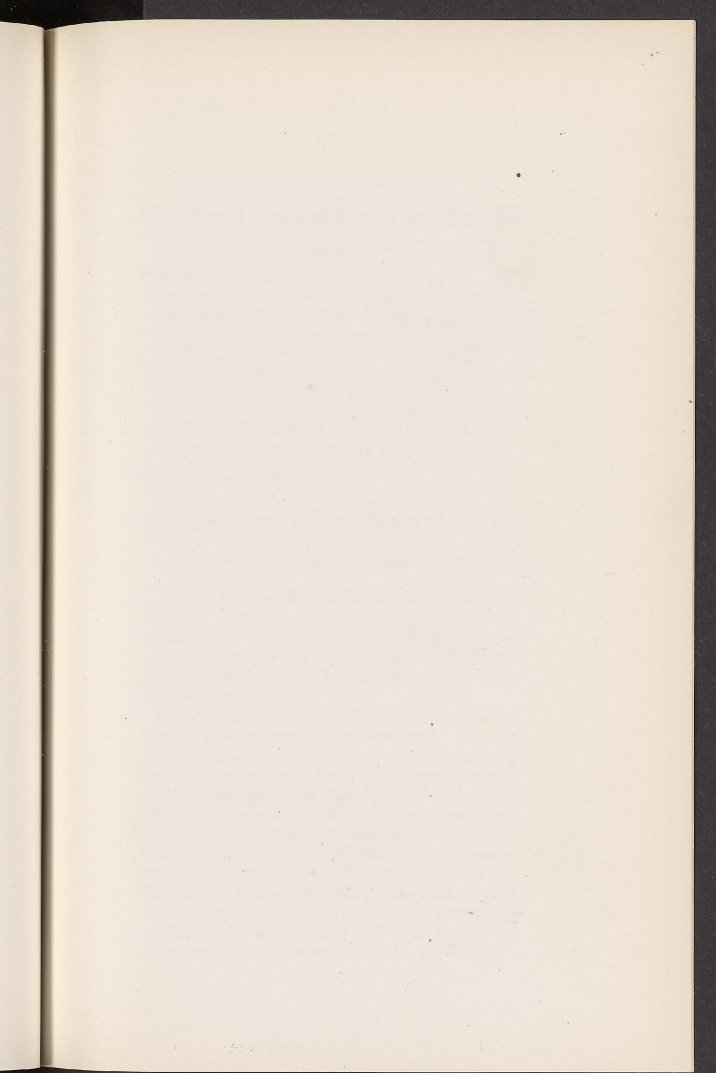
BY
JOHN H. COLEMAN
OF THE
CITY OF BOSTON

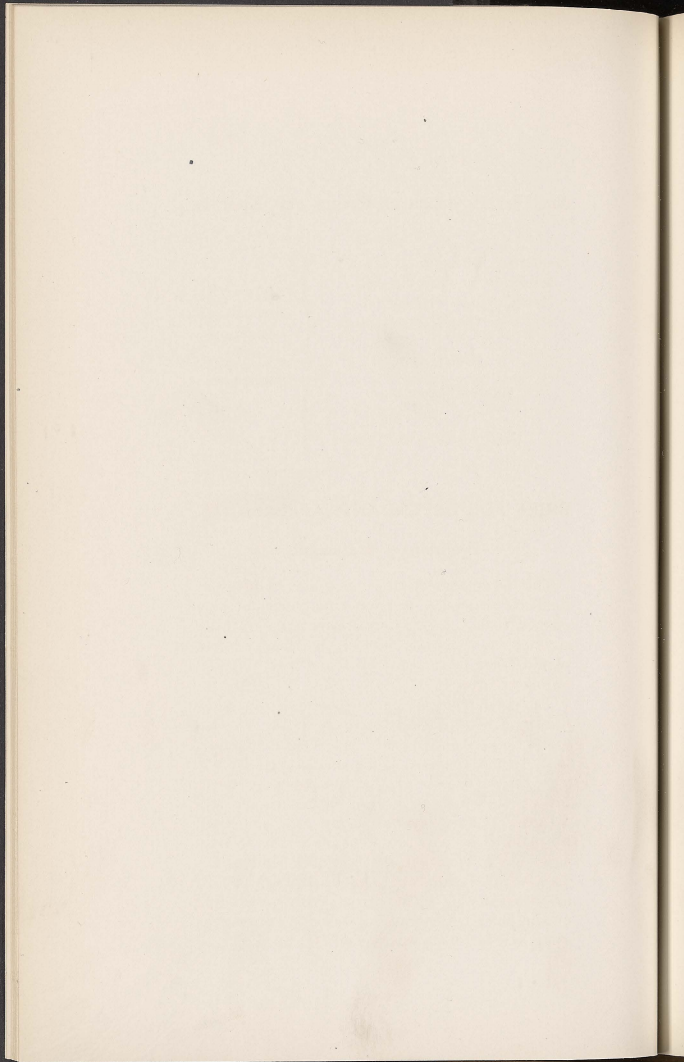
BOSTON:
PUBLISHED BY
J. B. LEECH, 15 NASSAU ST.

1857.

THE HISTORY OF THE
CITY OF BOSTON

BY
JOHN H. COLEMAN
OF THE
CITY OF BOSTON





New Jersey Court of Errors and Appeals

HARVESTER BUILDING & LOAN AS-
SOCIATION OF NEWARK, N. J., a
New Jersey Corporation,
Plaintiff-Appellee,

vs.

HANA ELBAUM and
SIMON ELBAUM,
Defendants-Appellants.

Action at Law.
On Appeal
from
Essex County
Circuit Court.

BRIEF FOR DEFENDANTS-APPELLANTS.

Preliminary Statement.

This is an appeal from an order striking defendants' rejoinder and entering judgment final against them. A previous appeal from an order striking the reply and entering judgment against plaintiff has been heard by this Court. (No. 76, October Term, 1937.)

The complaint (C., pp. 6-16) is based on a deficiency arising from a mortgage bond. The answer (C., pp. 17-19) pleads, as a separate defense, that certain tenants, Louis and Agnes Brown, were in possession of the mortgaged premises prior to the commencement of the underlying foreclosure suit, and that said tenants were not joined by plaintiff as parties defendant in the foreclosure suit, in violation of the requirements of the Vail Act (3 Comp. Stat. 3421, P. L. 1933, p. 172) as to exhausting its security, before proceeding on the bond. A motion to strike the answer as sham and frivolous was denied (C., pp. 19-35).

The reply (C., pp. 36-38) admitted the failure to join the said tenants in the foreclosure suit but denied that such omission had the legal effect claimed by defendants. It was alleged that neither the vendible value of the mortgaged premises nor the bidding therefor was affected by the circumstance of the existence of the tenancy on the day of sale. To support this position, plaintiff pleaded facts tending to show that the tenancy ended within a few days after the sale, and that an announcement was made at the sale that the premises would be sold free of all tenancies and that possession would be delivered with the deed. On defendants' motion, the reply was stricken as frivolous and judgment entered for defendants (C., pp. 39-48). On appeal, this Court reversed the Circuit Court, holding that the reply raised a question of fact (C., pp. 50-56).

After remittitur (C., pp. 56-57) defendants filed a rejoinder (C., p. 58), admitting certain specific allegations of fact contained in the reply and denying others. The allegation that neither the vendible value of the premises nor the bidding therefor was affected by the tenancy was denied. Plaintiff now moved for judgment on the pleadings (C., pp. 62-63). This motion was denied (C., p. 66). Notice of trial was served (C., p. 67). Plaintiff then moved to strike the rejoinder and enter judgment (C., pp. 68-83). This motion was granted (C., pp. 84-85), and the resulting order is the judicial action from which appeal is taken.

**The posture of the case at the conclusion
of the previous appeal.**

The question on the previous appeal was whether the facts alleged in plaintiff's reply were sufficient in law to excuse its failure to join the Browns as parties defendant to its foreclosure.

The line of cases beginning with *Deal Park Co. v. Bannard*, 2 N. J. Misc. 194 and terminating with *American-Italian B. & L. Ass'n. v. Liotta*, 117 N. J. L. 467, laid down the rule that the Vail Act required nothing short of complete exhaustion of the security and that all interests in the property had to be cut off, lest the mortgaged premises not bring the best possible price on foreclosure sale. It was the understanding of the bar generally from these cases that failure to subject a junior encumbrance to the operation of the foreclosure decree, *as a matter of law*, was a non-compliance with the Vail Act and precluded recovery on the bond for deficiency. In its opinion in *Harvester B. & L. Ass'n. v. Elbaum* (C., pp. 50-56), this Court corrected this misapprehension and further elucidated the rules of law with regard to the defense here involved. The case *sub judice* was distinguished from previous cases as the first in which the plaintiff alleged in its pleadings that the existence of the encumbrance unaffected by the foreclosure decree had not lessened the vendible value of the mortgaged premises by deterring bidders at the Sheriff's sale. It was held that the plaintiff was entitled to an opportunity to show, *as a matter of fact*, that the apparent encumbrance was of such a nature that it did not prejudice the sale. The allegations of the reply raised an issue of fact as to whether the presence of the tenancy under the surrounding circumstances did affect the vendible value of the mortgaged premises by deterring bidders, and hence plaintiff was entitled to a trial.

Now it must be noted that for the purposes of the motion to strike the reply all the allegations thereof were admitted, and they were accepted as true on appeal (C., pp. 50-51, ll. 39-40, 4-6): The allegation of paragraph No. 4 of the reply (C., p. 38, ll. 20-32) that neither the vendible value of the

mortgaged premises nor the bidding therefor was in any way lessened or affected by the tenancy, however, was a conclusion of law, and under well settled rules was not within the scope of the admission. Only the ultimate facts pleaded to induce that conclusion were accepted as true. *Koe-wing v. West Orange*, 89 N. J. L. 539. Hence, it was admitted:

1. That bill of complaint in foreclosure was filed July 20, 1935, *lis pendens* July 23, 1935, on which latter date the premises were untenanted.

2. That Brown rented an apartment from plaintiff as mortgagee in possession on August 22, 1935, and took possession September 1, 1935.

3. That on March 1, 1936 a notice to quit was served on Brown, effective April 1, 1936, and that Brown vacated a few days after April 1, 1938.

4. That the Sheriff's sale took place on March 31, 1936, an announcement being made thereat that the premises would be sold free of all tenancies and possession given on delivery of Sheriff's deed.

5. That the sale was confirmed on April 11, 1936, and deed actually delivered May 5, 1936, on both of which dates the premises were untenanted.

In the face of these admissions this Court said (C., p. 56, ll. 6-17):

“The allegations of the reply supported by affidavits may or may not be true. However, we are of the opinion that they raised an issue of fact as to whether the presence of this tenancy under the surrounding circumstances did

affect the vendible value of the mortgaged premises by deterring bidders. Since reasonable men might differ as to the answer, it became a question for the trier of facts."

In view of the admissions made by defendants for the purposes of the appeal, the first sentence of the quoted language could have referred only to the pleaded conclusions of law that the vendible value of the premises had not been affected by the existing tenancy nor the bidding therefor lessened. These allegations, in view of the circumstances surrounding the tenancy, might or might not be true. Reasonable men might differ as to the answer. It is obvious that this Court did not mean that reasonable men might differ as to the truth of the specific facts pleaded, viz., notice to the tenant, the announcement at sale, etc. That interpretation of the opinion would ignore defendants' admissions. The conclusion is inescapable that the decision of this Court was that, admitting the truth of all the facts well pleaded in plaintiff's reply, it was a question of fact whether the vendible value of the mortgaged premises had been lessened by the existence of the Browns' tenancy, whether bidders at the Sheriff's sale had been deterred thereby, and hence whether plaintiff had failed to exhaust its security. This issue was remitted to the Circuit Court for trial.

The proceedings at the Circuit after remittitur.

Upon the return of the case to the Circuit defendants deemed it advisable, although this Court had already declared an issue to have been joined, to file a rejoinder in order to more clearly define the issues of fact. The rejoinder (C., p. 58) set up no new facts but was confined to admissions and denials of the allegations of the reply. The

details of the rejoinder are more fully set out below.

Service of a bill of costs taxed on appeal (C., pp. 59-61) was met by defendants' motion in this Court for a disallowance of the same (C., p. 64). A decision followed that costs abide the event (C., p. 65).

Simultaneously with the demand for payment of costs, plaintiff moved for judgment on the pleadings (C., pp. 62-63). The theory of this motion defendants have never comprehended, unless it was a conception that the decision of this Court on appeal could in some peculiar fashion be construed as a final disposition. The motion was, of course, denied (C., p. 66).

The ever resourceful plaintiff then moved to strike the rejoinder on the grounds that it was sham, frivolous, and presented no legal defense, and to enter judgment final. To defendants' eternal astonishment and dismay the motion was granted. The propriety and soundness of that judicial action is argued below at length. For the moment permit us to propound the enigma thus:

All the allegations of a reply being admitted, an Appellate Court holds that the reply raises an issue of fact on the answer to which it is made. Can a trial Court, thereafter, although some of the allegations of the reply have in the meantime been denied, and the denials in some measure supported by affidavit, decide that no issue of fact remains?

POINT ONE.

The Circuit Court erred in striking defendants' rejoinder.

A. The rejoinder is not sham.

Plaintiff's reply contains four paragraphs. The first two paragraphs are designed to meet the allegations of the answer. The existence of the tenancy of Louis and Agnes Brown in the mortgaged premises and their omission as parties defendant in the foreclosure suit is admitted. It is denied that the duration of their tenancy was for the period alleged by defendants and that their omission in the foreclosure was a failure to exhaust plaintiff's security before action was commenced on the bond. Paragraph 3 makes the following allegations:

1. That there was no tenant in possession of the mortgaged premises on the dates of filing of *lis pendens*, confirmation of sale, and delivery of deed to Sheriff's grantee.
2. That on March 1, 1936, a one month's notice to quit was served on the tenants, which notice was effective on April 1, 1936, one day after the Sheriff's sale, and that the tenants actually vacated a few days after April 1, 1936.
3. That at the sale, before the bidding commenced, the plaintiff caused an announcement to be made that the premises would be sold free of all tenancies and that possession would be delivered with the Sheriff's deed.
4. That possession actually was delivered with the Sheriff's deed.

Paragraph No. 4 alleges that neither the vendible value of the mortgaged premises nor the bidding therefor was lessened by the circumstances of the Browns' tenancy.

An inspection of defendants' rejoinder discloses that it denies the following allegations of paragraph No. 3 of the reply:

- (a) That the premises were untenanted at the time of confirmation and at the time of delivery of the deed.
- (b) That the notice to quit was served as alleged, and that the tenants vacated the premises a few days after April 1, 1936.
- (c) That the announcement was made at the sale as alleged.
- (d) That possession was delivered with the Sheriff's deed.

The allegations of paragraph No. 4 of the reply are denied in their entirety.

In support of their rejoinder, defendants filed the affidavits of Agnes Brown, Simon Elbaum and Alfred Kemper (C., pp. 79-83). Plaintiff supported its motion by the affidavits of Max M. Albach, Herman Rieke and Nathan Perselay (C., pp. 70-78).

The affidavit of Agnes Brown states that she and her husband vacated the mortgaged premises on or about May 1, 1938. This raises a question of fact on the allegation of the reply that the premises were untenanted on April 11, 1936, the date of confirmation of sale. Her affidavit further categorically denied the service of a notice to quit on March 1, 1936, but states that the said notice was delivered to her by plaintiff's agent, Rieke, in the early part of April, 1936, with the advice not to pay any attention to it. The alle-

gations of plaintiff's reply with respect to the notice to quit are thus in sharp issue.

The allegation of the reply that possession was delivered with the deed was not met by affidavit at the time of the argument of the motion. However, the Court's attention is respectfully directed to the Sheriff's deed printed in the State of Case. The acknowledgment (C., p. 105) is taken on April 17, 1936, at which time, it clearly follows, the deed was ready for delivery. It was not actually delivered, according to plaintiff's affidavits, until May 5, 1936. But the deed would have been delivered, had plaintiff so chosen, at any time after April 17. On that date Mrs. Brown swears she and her husband were in possession of the mortgaged premises. That the premises were untenanted at the time of delivery of the deed is so, but only because plaintiff, the purchaser, delayed calling for it more than two weeks after it was ready for delivery.

The denial in the rejoinder concerning the announcement made by plaintiff at the sale was unsupported by defendants at the time of the motion. No representative of defendants attended the sale. The denial was interposed in order to provide an opportunity for cross examination of plaintiff's witnesses on this point at the time of trial. A statement as to lack of information and belief on this point would undoubtedly have been more artful pleading.

The denial of the allegations of paragraph No. 4 of the reply, concerning the effect of the existence of the tenancy upon the vendible value and the bidding, was supported by the affidavit of Alfred R. Kemper, a real estate expert. Kemper states that, in his opinion, the vendible value of the premises was affected by the tenancy on the date of the sale because:

1. The neighborhood in which the property is located is developing into a business area. A purchaser would desire immediate and complete possession in order to convert the existing dwelling into business property.
2. The failure to completely foreclose a mortgage, no matter how small the interest remaining, deters intelligent and careful bidders. They do not buy lawsuits.
3. The announcement at the sale might have deterred rather than encouraged some bidders. It was an unusual one and might cause some people to scent trouble (C., p. 83).

In the opinion of the Court below, this affidavit was incompetent to support the relevant part of the rejoinder, on the theory that expert testimony was not admissible to show a lessening of vendible value, or a deterring effect on bidders. It appears to have been the view of that Court that defendants must produce a bidder who was actually deterred (C., pp. 93-94, ll. 35-40, 1-29). The cases laying down the rule that the mortgagor must exhaust his security, and setting up the tests of diminution in vendible value and a deterrent effect on bidders, have not gone so far as to require a defendant in a deficiency suit to show that a bidder was actually deterred. The difficulties of such proof would be such as to make the pleading of the defense a vain gesture. It is enough to show that there was a likelihood of bidders being deterred. It is submitted that expert testimony is the *only* testimony capable of production in the average case, and that the issue is one peculiarly adapted to the use of such testimony. Indeed, this Court, in its previous opinion in this cause, has tacitly approved the use of such testimony (C., pp. 55-56, ll. 23-40, 4-6). Plaintiff sup-

ported its reply by just such an affidavit as defendant submits here and that affidavit was quoted in the opinion of this Court as the proof upon which its conclusion that the reply raised an issue of fact was rested.

It is submitted, then, that the only allegations of defendants' rejoinder which are unsupported by sworn proof are those denying the announcement at the sale and that the premises were untenanted at the time of delivery of the Sheriff's deed. Other material allegations of the reply are in issue. Plaintiff's motion was addressed to the rejoinder as a whole. If material parts of the pleading were not sham, it was manifest error to strike the entire pleading as false in fact.

No more persuasive peroration to this phase of defendants' argument can be found than the cogent language of Mr. Justice Heher in *Louis Kamm, Inc. v. Flink*, 113 N. J. L. 582 (at 596):

“The falsity of the pleading must be apparent. The power to strike out a pleading as frivolous, sham, or false, will not be exercised, unless it appears to be clearly, palpably so. It is a power that has always been cautiously exercised. It was not the province of the court below, on this motion, to determine the veracity of the respective parties. That was a question of fact to be determined by a jury. The duty of the court, on a motion to strike out a pleading as sham, is to determine whether an issue of fact is presented, and not to try the issue. If an issue of fact is exhibited, the parties tendering it cannot be deprived of the benefit of a trial in the ordinary mode. The court will not try the case on affidavits. It is only where the matters set up in the affidavits submitted on the part of the defendant, on a motion such as this, are not controverted, and demonstrate that the cause of action pleaded is a sham, and is without factual support, that the court is justified in granting the motion. Solomon

v. Salins, 108 N. J. L. 214; 157 Atl. Rep. 383; Jaeger v. Naef, 112 N. J. L. 417; 171 Atl. Rep. 166; Torricelli v. Sebastini, 112 N. J. L. 458. A contrary rule would work a deprivation of the constitutional right of trial by jury."

B. The rejoinder is not frivolous.

The rejoinder contains no affirmative allegations. It is confined to admissions and denials of matter alleged in the reply. It is obvious that if the facts set up in the reply are germane to the issues raised by the previous pleadings, the saying of yes and nay to those statements cannot be frivolous. The opinion of the Court below does not indicate a decision that the rejoinder was frivolous. The use of the term in the order striking out the rejoinder would appear to have been gratuitous.

POINT TWO.

Assuming that the rejoinder is sham or frivolous and should have been stricken, the Court below erred in holding that such a determination was dispositive of the whole case.

A. This Court has held that there was an issue of fact raised by the answer and reply.

As has been demonstrated above, the final conclusion of this Court on the previous appeal was: *Admitting the truth of the allegations of the reply, there still remains a question of fact for the jury.* This somewhat unusual situation arises from the course of pleading followed by the parties. Let us review it for a moment. The substance of the answer was that plaintiff had not exhausted its security. That defense rests on a single uncon-

trovertible fact—the tenants Brown were not joined in the foreclosure suit. From this fact, in the words of this Court, there arises a “presumption” that a certain class of bidders might be deterred so that the best price would not be obtained at the Sheriff’s sale. The first part of the reply denies the allegations of the answer. The second part gives all the circumstances (favorable to plaintiff) surrounding the tenancy of the Browns and alleges that, by reason of those circumstances, the vendible value was not affected and bidders were not deterred. These allegations, though made affirmatively, are in substance a denial. They are the evidentiary facts upon which plaintiff bases its position that the failure to cut off the tenants was not such an omission as amounted to a failure to exhaust the security. The reply does not plead matter in avoidance. The issue tendered by the answer is “You did not exhaust your security”. The reply is “We did exhaust our security”, plus a number of specific factual statements justifying the denial. The evidence offered by defendants is the failure to join the Browns as parties to the foreclosure; the evidence on the part of the plaintiff is the details of the tenancy, the announcement at the sale, the delivery of possession with the deed. With the proof in this posture, this Court has said a question of fact remains. When the Court below struck the rejoinder it left the case in the exact posture it was in when this Court’s opinion was written. The Court below in determining that its decision on the motion to strike the rejoinder was dispositive of the whole case was flying directly in the face of a contrary determination by the highest Court of the State. The opinion of the trial Court reads in part (C., p. 94):

“In this determination I am mindful of the fact that the opinion of the Court of Errors

and Appeals in this case in reversing the granting of the judgment for the defendants states: 'The allegations of the reply supported by affidavits may or may not be true. However, we are of the opinion that they raised an issue of fact as to whether the presence of this tenancy under the surrounding circumstances did affect the vendible value of the mortgaged premises by deterring bidders. Since reasonable men might differ as to the answer, it became a question for the trier of facts.' But the matter is in a different position presented now to me than it was as presented to the Court of Errors and Appeals. Since the determination by the upper court a rejoinder has been filed to the reply which, under the affidavit submitted, does not raise an issue as to any fact which might be in dispute but merely sets forth an opinion of a real estate expert as to the effect the tenancy would have upon the vendible value of the property and the bidding at the sale. This, as I have stated, I do not think raises an issue of fact to submit to a jury."

Assuming that the decision of the Court below as to the shamness and frivolity of the rejoinder is sound and that no issue of fact is raised thereby, it must be remembered that the controverted portions of the rejoinder were pure denials of matter in the reply. The determination that defendants were unable to substantiate denials of allegations in the reply did not change the situation as it existed upon the remission of the cause to the circuit for trial. This Court had said that there was an issue of fact, admitting the truth of the facts in the reply.

If this Court had been of the opinion that the reply was dispositive of the case, if all its allegations were admitted, and defendants were unable to adduce proof to the contrary, it would not have remitted the cause for trial by jury. Rather it

would have remitted the cause to give defendants an opportunity to plead further, or in default of such pleading, for the entry of judgment against defendants.

B. The fact of the announcement at the sale is not conclusive on the issue of impairment of vendible value.

Justice Porter, who, as Circuit Court Judge, heard the earlier motions to strike the answer, and to strike the reply, said in his opinion filed on the motion to strike the answer: (C. p. 34.)

“A careful consideration of the briefs and cited authorities leads me to the conclusion that the tenants in question were necessary parties to the foreclosure suit, *that the sale was not in fact or in law free from that tenancy even though so announced. This is so, in my opinion, even though the tenant was willing to and did surrender possession on a subsequent date.*”

It is submitted that it was impossible for the Sheriff to sell the mortgaged premises free from the tenancy of the Browns. A Sheriff must sell in accordance with the terms of his writ. He cannot permit those terms to be altered by any interested party. In *Stevenson v. Black*, 1 N. J. Eq. 338, at page 344, the following language is found:

“He (the Sheriff at a foreclosure sale) was the officer of the law, and as such, bound to sell according to the direction of the law, and not the direction of any interested person. It would be strange, indeed, if it were otherwise. It would be in the power of a sheriff to embarrass, if not wholly defeat, any sale, by the imposition of terms such as the law will not warrant. It is the duty of the sheriff to sell the property according to the exigency of the writ. If he undertake,

by any conditions of sale, to vary the relative position of parties, and to create liabilities which the law does not impose, he exceeds his authority, and the party is not bound."

See also 42 *Corpus Juris* 202, Sec. 1831 d, where it is said:

"The sale must be made in accordance with the terms and conditions stated in the decree or order of sale, or the statute, and the referee has no authority to add other terms on his own motion or at the suggestion of plaintiff, although it is proper for him fairly and truthfully to state therein the condition of the mortgagor's title."

The Sheriff can pass title only to the rights of the mortgagee and all defendants to the suit. *Wimpfheimer v. Prudential Ins. Co.*, 56 N. J. Eq. 585, as of the time of institution of suit. *Bourgeois v. Edwards*, 104 At. 447; *Mount v. Manhattan Co.*, 43 N. J. Eq. 25, aff. 44 N. J. Eq. 297.

It is thus seen that, while it was competent for plaintiff to state the existing encumbrances at the time of sale, the Sheriff could only sell *subject to*, and not *free from*, those encumbrances. The announcement was not part of the Sheriff's conditions of sale.

In its reply brief on the previous appeal, plaintiff had the following to say on this issue:

"The decree directed the premises to be sold. Nothing being said about tenancies the presumption is that the premises were to be so sold that the purchaser by his deed would take a fee simple free of encumbrances and possessory rights in others. What the complainant's solicitor did was to say to the buying public that that is exactly what the purchaser would get, informing the bidders that with the Sheriff's deed would go possession and *inferentially* assuring the bidders that if

any tenancies presently existed they would be put to an end before the purchaser was tendered the Sheriff's deed. Such an announcement is not objectionable. In *Luker v. Fitzer*, 177 N. Y. Supp. 559, the selling referee in foreclosure announced at the sale the existence of a tax title *which had not been cut off by the foreclosure* and mention of which appeared nowhere in the proceedings. This announcement was challenged as being a departure from the directions of the order of sale. The New York Court said that 'the customary and usual practice on the part of referees in mortgage foreclosure cases, of stating the condition of the title in the terms of sale, when it is fairly and truthfully done, is not only not to be condemned, but is to be commended. Otherwise bidders must search the record as a preliminary to intelligent bidding.' The Court further said that '*what could pass by the foreclosure sale was what purported to be sold and must have been so understood by the purchaser. No wrong is done in requiring him to pay for exactly what he bought.*' "

"What purported to be sold" at the sale in the instant case was a property subject to a tenancy. No announcement by plaintiff could authorize the Sheriff to sell more, and the purchaser bought exactly that. The fact that the tenancy was at a subsequent date removed is unimportant. The minds of bidders are not clairvoyant. On the day of the sale the premises were encumbered. They were sold in that condition. And their vendible value was that of encumbered property. The authority cited in the quoted portion of plaintiff's former brief approves the announcement at a sale of the condition of the title. It cannot be stretched to permit a complainant in foreclosure to authorize the Sheriff to sell a better title than that guaranteed under the foreclosure decree.

Assuming, however, that it was within the power of the plaintiff to make the alleged announcement at the sale, and that the Sheriff could sell in compliance with plaintiff's direction, it by no means follows that any depressing effect on the vendible value was removed.

In his conclusions the trial Judge says (C., p. 93):

“It is my view that the announcement at the sale—was sufficient to dispose of any effects that the possession by a monthly tenant might have—any deterring effect on bidders or any effect of lessening the vendible value of the mortgaged premises at the date of the sale.”

It must be noted once more that the reply pleaded this announcement, that on the previous appeal the announcement was admitted for the purposes of argument, and that this Court held, despite the announcement, that the plaintiff, at best, was entitled to a trial of the facts. The announcement at the sale is just one circumstance of many that a jury must consider in determining whether the existence of the Browns' tenancy was a failure to exhaust the security.

It is argued that no one hearing the announcement at the sale would be deterred from bidding, since he would know that his acceptance of the deed would be conditional on the conditions of sale as to possession being fulfilled. This argument ignores the fact that there may have been prospective bidders for the mortgaged premises, who, being informed previously of the existence of the tenancy, and desiring immediate possession, failed to attend the sale. The announcement would not cure the situation so far as those persons were concerned. And defendants are damaged if so much as one prospective bidder is deterred from attending the sale. It makes no

difference to them whether there are 1,000 bidders who would have attempted to buy the premises, save for the deterrent factor, or one. Any bid would have saved them some money, and by the same token, if any bidder was deterred, the plaintiff's security has not been exhausted.

To a prospective bidder attending the sale, the announcement was not necessarily an inducement to "free and unrestricted bidding" (C., p. 44). Let us follow the course of a man interested in purchasing the mortgaged premises at the Sheriff's sale. Mr. Acrebuyer reads the notice of sale in the newspaper. He visits the premises, makes an inspection, and ascertains that Brown and his wife are in possession of an apartment in the building. He then makes, or causes to be made, an abstract of the foreclosure proceeding. This reveals immediately that the Browns are not parties defendant thereto. "Aha," says Acrebuyer to himself, "there is a flaw in this title. If I buy the property I will not be able to secure immediate possession!" From this point on his conduct may vary greatly. He may wash his hands of the matter entirely. But let us assume that he decides to attend the sale. It is inevitable that there will be in his mind the feeling that the parcel is damaged goods. At the sale he hears an announcement that the property is being sold free and clear of all tenancies and that possession will be delivered with the deed. The announcement is made in response to the query "are there any further encumbrances?" Does this set our wily real estate purchaser's mind at rest? No! It confirms his previous information that there is an existing tenancy which has not been subjected to the operation of the foreclosure decree and hence is an encumbrance. While it is true that he will be able to reject the deed if possession is not delivered therewith, he cannot compel

performance of the plaintiff's announced undertaking. If the plaintiff should fall down on its promise there will follow the loss of time, the red tape, and the annoyance attendant upon the disavowal of a purchase made at a judicial sale. With this prospect ahead of him will Acrebuyer, if he bids at all, bid as high as he might for a property with no such involvements? That question, it is submitted, is one on which reasonable men might well differ. It is not an issue so transparent as to be a question for the Court.

The argument just advanced is supported by the affidavit of Kemper previously referred to. But even without any actual testimony on the issue, the effect of the announcement on the mind of a bidder, is certainly a matter for jury deliberation.

C. The tenancy of the Browns survived the foreclosure, admitting all the facts pleaded in the reply.

In his conclusions the trial Judge sums up defendants' separate defense (C., p. 86, ll. 35-40) as being that the Browns were tenants in possession "prior to the filing of the foreclosure bill" and were not made parties to the foreclosure suit. The allegation of the answer is that the Browns were in possession "prior to the commencement of the foreclosure". On page 88, at lines 9-17, he says that the undisputed facts are that plaintiff had gone into possession as mortgagee and that all tenants had vacated prior to the foreclosure. On page 90, at lines 30-40, he says that the rejoinder admitted that the premises were let to the Browns on August 22, 1935, "which is after the commencement of the foreclosure". It is quite apparent that the Court below fell into error if it concluded that the tenancy of the Browns be-

gan after the commencement of the foreclosure suit. The affidavit of Simon Elbaum discloses that subpoena, dated October 29, 1935, was served upon him and his wife on November 6, 1935 (C., p. 81). This affidavit is uncontroverted. The undisputed facts from both plaintiff and defendants' affidavits are as follows:

1. The *lis pendens* was filed on July 23, 1935.
2. The agreement of lease with the Browns was made on August 22nd, 1935.
3. The Browns took possession on September 1, 1935.
4. Subpoena, dated October 29, 1935, was served on November 6, 1935.

On the previous appeal it was argued at length that the foreclosure action was not commenced until issuance of subpoena and hence that the Browns were in possession before the commencement of the foreclosure. This point will not be argued extensively again but the Court's attention is respectfully directed to the following cases: *Kocher's Chancery Precedents*, Sect. 787; *Haughwaut v. Murphy*, 22 N. J. Eq. 531; *Walker v. Hill*, 22 N. J. Eq. 513; *Vineland Nat'l. Bank v. Shinn*, 55 N. J. Eq. 415; *Metropolitan Life Ins. Co. v. Lodginski*, 188 Atl. 681.

The concluding paragraph of the trial Judge's opinion reads as follows:

"It is also my view that a tenant who holds his tenancy under a mortgagee in possession has no greater rights than the mortgagee, and the foreclosure decree terminates the said tenant's right in the property, and he is subject to be ejected by writ of assistance issued in the foreclosure proceedings, and the purchaser under the Sheriff's sale may be put in possession of the property."

This proposition, also, was argued at length in the previous appeal. Defendants' position with regard to this point may be summarized as follows:

1. The *Lis Pendens* Act provides that the filing of notice of *lis pendens* shall be binding upon any person claiming an interest in lands "through any defendant in such suit." The Browns derive their tenancy through plaintiff as mortgagee in possession and hence were not bound by the *lis pendens*.
2. The Browns, in any event, were necessary parties to the foreclosure, since their interest arose *prior* to the commencement of the foreclosure suit.
3. The *Liotta* case presented a situation in which a monthly tenant who had attorned to the mortgagee in possession was omitted as a party defendant. That tenancy was declared to be an encumbrance, and the Browns' tenancy is of exactly the same character.
4. The authorities of *Strong v. Smith*, 68 N. J. Eq. 686, and *N. J. B. & L. Investment Co. v. Schatzkin*, 79 N. J. Eq. 175, hold that a writ of assistance will not issue against a tenant who holds under the circumstances here exhibited.

It must be assumed that defendants' position in this respect was approved by this Court. If this Court had been of the opinion that the tenancy of the Browns did not survive the foreclosure, a judgment in plaintiff's favor must have followed, since the backbone of the defense would have been gone.

Conclusion.

It is respectfully urged that the Court below erred in striking defendants' rejoinder and entering judgment final against it, for the following reasons:

1. The defendants supported a substantial number of the material allegations of their rejoinder by competent affidavits. The rejoinder is not sham.

2. The rejoinder, consisting entirely of admissions and denials of allegations of the reply, is not frivolous, for otherwise the reply must also be frivolous.

3. Assuming the rejoinder is sham or frivolous, or both, and was properly struck, the Court below erred in entering judgment final. The decision on the motion to strike the rejoinder was not dispositive of the whole case. This Court had previously held that an issue of fact was raised by the answer and reply. That determination was binding on the Court below. It was under a duty to permit defendants a trial by jury of such issues. The filing and striking of the rejoinder did not alter the case so as to place it in different status with regard to triable issues than existed upon remission to the Circuit after the previous appeal.

4. The inability of the defendants to support a denial of the announcement at the sale was not decisive of the case. The fact of the announcement was not conclusive on the issues of the effect of the Browns' tenancy on the vendible value of the mortgaged premises and as a deterrent to bidders at the sale.

Your defendants-appellants therefore respectfully submit that the judgment of the Circuit Court should be reversed, and the cause remitted for trial of the issues of fact presented.

SIMON M. SELEY,
Attorney for and of Counsel with
Defendants-Appellants.

LESTER SANDLES and
BENJAMIN L. STERN,
On the Brief.

To be argued orally by
SIMON M. SELEY,
Of Counsel.

New Jersey Court of Errors and Appeals.

HARVESTER BUILDING & LOAN AS-
SOCIATION OF NEWARK, N. J., a
New Jersey corporation,
Plaintiff-Appellee,

vs.

HANA ELBAUM and SIMON
ELBAUM,
Defendants-Appellants.

Action at Law.

On Appeal from
Essex County
Circuit Court.

Sat below:

William A. Smith,
C. C. J.

BRIEF FOR PLAINTIFF-APPELLEE.

(All italics and the like are ours unless otherwise stated.)

Action Appealed From.

By this appeal there are brought up for review an order entered at the Essex Circuit on June 6, 1938 striking out the defendants' Rejoinder and ordering final judgment in favor of the plaintiff and against the defendants, and also the judgment itself, entered on June 7, 1938.

History of Earlier Stages of Litigation as Presented by the State of Case.

Plaintiff's action was brought at the Circuit on the defendants' bond and sought the recovery of the deficiency resulting from the sale

of certain mortgaged lands and premises, such sale having been decreed by the Chancellor in a suit to foreclose the plaintiff's real estate mortgage. The action was brought within the appropriate period and after the filing of the requisite statutory notice of the proposed commencement of the action. The answer presented a single defense, viz., that the plaintiff had, in the antecedent foreclosure suit, omitted to join as parties defendant a Louis Brown and his wife, they having been monthly tenants and in possession of one of the two flats in the building standing on the mortgaged lands. The answer asserted that in consequence of such omission the tenants' interest in the mortgaged premises was liberated from the effect of the foreclosure decree and that their rights were not cut off or debarred by that decree. The answer further averred (S. C. 18) that because of that omission "the foreclosure sale was made and the purchaser took the mortgaged premises subject to the rights of the existing tenants and subject to their possession of the mortgaged premises and for said reasons there is no cause of action for a deficiency as alleged in the bill of complaint herein". The answer did not allege that such omission had had any deterrent effect on bidders or that the vendible value of the mortgaged premises had in any way been affected thereby. In that posture of the pleadings a motion was made to strike the answer as sham and also as presenting no legal defense. That motion was heard and denied by Circuit Court Judge Newton H. Porter.

Thereupon the plaintiff filed its reply (S. C. 36-38), by which it was made to appear that the mortgaged premises were on July 20, 1935 held

by the plaintiff as mortgagee in possession, that the premises were then wholly vacant, that on that day the plaintiff filed its foreclosure bill and three days later (July 23, 1935) filed its lis pendens in the Essex Register's office, giving notice in accordance with the statute of the pendency of the foreclosure suit; that on August 22, 1935 the plaintiff rented one of the two flats to Lonis Brown as a *monthly tenant, such tenancy to commence on September 1, 1935*; that on March 1, 1936 plaintiff served upon the tenant Brown a one month's notice terminating the tenancy and requiring Brown to quit on April 1, 1936 and that Brown actually vacated the premises a few days thereafter.

By the reply it further appeared that the Sheriff's vendue was held on March 31, 1936 and that before the bidding commenced the plaintiff read an announcement to all bidders present that the premises would be sold free of all tenancies or rights of tenants and *that possession would be given upon the delivery of the Sheriff's deed*, that the sale was confirmed by the Chancellor on April 11, 1936 and the deed was delivered by the Sheriff on May 5, 1936 and that both on the date of confirmation and the date of the delivery of the deed the premises were wholly untenanted and that *"with the delivery of the Sheriff's deed to the purchaser was delivered actual and full possession of the entire premises sold at said Sheriff's sale* (S. C. 38). Because of the foregoing facts, set up affirmatively and for the first time, the reply contained what the appellants now characterize as a conclusion of law, viz., that at the Sheriff's sale neither the vendible value of the mortgaged premises nor the bidding therefor was lessened

or affected by Brown's tenancy. Whether or not the last mentioned statement was a "conclusion of law" is quite immaterial. It may be more correct to regard it as a mixed conclusion of law and fact. The salient thing is the portion of the reply which sets up the announcement and promise made at the Sheriff's sale and the fact of its fulfillment by the delivery of the Sheriff's deed conjunctively with the delivery of possession to the entire mortgaged premises.

The legal sufficiency of the plaintiff's reply was assailed by defendants' motion to strike and for the entry of summary judgment (S. C. 39). On that motion the plaintiff by affidavit supported all the material allegations of its reply (S. C. 40-44). Nonetheless the motion was granted by Judge Porter for reasons set forth in his letter of May 28, 1937 (S. C. 45). Those reasons must be read in the light of his earlier opinion (S. C. 33). The Circuit Court Judge regarded the holding in *Italian American B & L Assn. v. Liotta*, 117 N. J. L. 467, as all-controlling and admitting of no differentiation and was of the view that the *mere* omission to join a monthly tenant in an underlying foreclosure suit precluded all right of recovery against the obligor, and this without regard to whether or not the omission affected *practically* the bidding at the sale. Accordingly, he struck the reply and entered summary judgment against the plaintiff. That judgment was reviewed in this Court at the October 1937 Term (Case #76) and resulted in a reversal (119 N. J. L. 437). In so reversing, this Court pointed out that "the Court below failed to observe the material distinction between the instant case and the *Liotta* case"

(S. C. 53) and that where there is an absence of allegation and proof a *presumption* naturally arises that the omission of a tenant from the foreclosure suit might deter a certain class of bidders at the Sheriff's sale so that the best price would not be obtained (S. C. 53, line 20). This Court then laid down a rule of reason, applicable in situations of this kind. The rule requiring the exhaustion of security was pronounced to be "a *practical* rather than a theoretical one." This Court said (S. C. 54):

"Now what is the purpose or reason for this statutory requirement to first 'exhaust' the security completely? We believe that this reason is a practical rather than a theoretical one. The legislative intent, as interpreted by the courts, shows a 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. If this is done, the property has been 'exhausted' and the mortgagee may then proceed on the bond for the deficiency."

The *practical test* was by this Court given application to the instant case when it said (S. C. 55):

"Therefore it may be said that the mortgagee did exhaust his security in compliance with the statute if he 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 deed, or otherwise."

This Court remitted the record to the Circuit Court, there to be proceeded with in accordance with the judgment of the Appellate Court *and the practice of the Circuit Court* (S. C. 57). Thereupon the defendant filed the Rejoinder, the striking of which resulted in the entry of the summary judgment for the plaintiff, which judgment is now challenged by the present appeal. That Rejoinder (S. C. 58) admitted several of the allegations of the reply, *including the allegation that the Sheriff delivered his deed on May 5, 1936*. By a blanket denial of all the unadmitted allegations the defendants denied (1) the announcement made at the Sheriff's sale before bidding commenced and (2) that with the delivery of the Sheriff's deed to the purchaser there was "delivered actual and full possession of the entire premises sold at said Sheriff's sale" (Allegation of Reply, S. C. 38). The Rejoinder also denied the conclusion that the vendible value had not been adversely affected.

After the reversal by this Court the plaintiff, not having been informed of the filing of the Rejoinder, moved against the answer. Judge William A. Smith was of the opinion that the answer could not be attacked after a reply had been filed thereto and that, therefore, the motion was "*unseasonably*" made (S. C. 66). He held, however, that the challenge could be made to the last pleading, viz., the Rejoinder, and accordingly he reserved to us the right to move to strike the Rejoinder as sham and frivo-

lous (S. C. 66, l. 30). The cause was noticed for trial on the commercial calendar "subject to the reserved right to move to strike the Rejoinder and enter judgment final for the plaintiff" (S. C. 67). That motion was immediately made on three grounds, viz.:

- (1) That the Rejoinder is sham,
- (2) That the Rejoinder is frivolous, and
- (3) That the Rejoinder discloses no matter of legal defense.

Proceedings on Plaintiff's Motion to Strike Rejoinder.

The last mentioned motion was also for judgment final on the ground that the decision of the motion would in point of law be decisive of the whole case. The motion was supported by three affidavits (S. C. 70-78). By those proofs there was established every fact essential to the plaintiff's recovery, including the two facts which had been denied by the defendants' Rejoinder, viz.:

(1) The announcement at the Sheriff's vendue.

(2) That with the Sheriff's deed was delivered actual and full possession to the mortgaged premises in their entirety.

In opposition to those proofs the defendants presented three affidavits which in brief were as follows:

First: The affidavit of Mrs. Brown admitting that the Browns actually vacated the premises "on or about May 1, 1936." There was no

Note:- Brown in his earlier affidavit (S.C. 30) fixed May 1 as the day certain.

denial of the allegation that the premises were wholly vacant on May 5, 1936, the date the Sheriff delivered his deed to the purchaser.

Second: The affidavit of the defendant, Simon Elbaum, that he was served with subpoena ad respondendum on November 6, 1935, and that the subpoena was dated October 29, 1935.

Third: The affidavit of Kemper, a real estate man, to the effect that he understood that the monthly tenant, Brown, had received "a notice to quit on April 1, 1936, the day following the Sheriff's sale" and that the affiant had also been informed of the announcement made at the Sheriff's sale that the premises would be sold free of tenancies and that possession would be delivered with the deed. That witness expressed his opinion that "the failure to cut off an interest in the premises by foreclosure, *no matter how small that interest may be*, is an absolute deterrent to careful bidders" and that the announcement made at the sale "was of little importance" (S. C. 83).

THERE WAS AN UTTER ABSENCE IN THE DEFENDANTS' PROOFS OF THE FOLLOWING:

(1) Any denial of the announcement made at the Sheriff's sale.

(2) Any denial that the premises were vacant on May 5, 1936 when the Sheriff delivered his deed.

(3) Any denial of the allegation that with the Sheriff's deed went full possession to the entire mortgaged premises.

(4) Any proof that any person had actually been deterred from bidding by the mere circumstance that Brown's transient monthly tenancy existed on March 31, the date of the Sheriff's vendue.

Circuit Court's Holding on Proofs and Motion for Summary Judgment.

Judge William A. Smith struck the Rejoinder on the several grounds advanced by plaintiff (S. C. 84). The Court's order recites that it had been alleged in plaintiff's reply and established by the plaintiff's affidavits on the motion that "at the Sheriff's vendue held on March 31, 1936 and before the bidding commenced the plaintiff caused an announcement to be read to all bidders present that the mortgaged premises would be sold free of all tenancies or rights of tenants in the property and that possession would be given upon the delivery of the Sheriff's deed, and that when said deed was delivered by the Sheriff to the purchaser on May 5, 1936 there was delivered therewith actual and full possession of the entire mortgaged premises so sold at the Sheriff's sale, said premises having been previously vacated by the tenant, Brown, and the foregoing facts not being denied or controverted by the defendants' affidavits on this motion." The order struck the Rejoinder as sham and frivolous, and the Court being of opinion that its determination on the questions raised by the pleadings and proofs was decisive of the whole case, it ordered judgment final to be entered for the plaintiff.

The Circuit Court's opinion appears on pages 86 to 95 of the State of the Case. In it is pointed

out that the defendants did not dispute the fact that the tenant was a monthly tenant *holding under the mortgagee* and that his tenancy commenced on September 1, 1935, and further that the defendants admit the fact that the monthly tenant vacated the premises before the delivery of the Sheriff's deed. The Court further points out that no denial was made by the defendants of the announcement made at the Sheriff's sale (S. C. 91, ll. 20-40). The Court's conclusions were as follows, viz:

(1) No facts were presented by the defendants showing that any bidder or bidders had been deterred by the circumstance of the Brown monthly tenancy.

(2) That the announcement at the Sheriff's sale was sufficient to dispose of any deterring effect that the monthly tenancy might otherwise have had.

(3) That expert testimony was not admissible to say that a bidder would be deterred by the possession of a monthly tenant in the property where the purchaser would receive the property free and clear of such possession and would obtain full possession of the property on the delivery of the deed.

(4) That where the facts are not in dispute, as in the instant case, as to the circumstances surrounding the sale, it is for the Court to say whether or not the vendible value was affected or whether or not the bidding would be deterred and that the question was one not submissible to the jury but was a Court question (S. C. 94).

(5) That what the Court of Errors and Appeals had previously said (that the allegations of the reply raised an issue of fact)

related to the case in its posture when previously before the Court of Errors and Appeals, and that the situation newly presented to the Circuit Court was different because since the determination by the Appellate Court a Rejoinder had been filed to the reply, which Rejoinder the defendants had failed to sustain when challenged by plaintiff's motion and supporting affidavits.

(6) That a tenant who holds his tenancy under a mortgagee in possession derives his rights from the mortgagee and has no greater rights than the mortgagee and that the foreclosure decree terminates his rights and he becomes subject to ejection by writ of assistance.

Each of these holdings is manifestly sound law and the result of careful thinking. While each holding is sufficient to overthrow the attempted defense, one holding is particularly outstanding, viz., the one relating to the effect of the announcement made at the Sheriff's sale. We shall deal with that presently.

We here meet appellants' two points in the order in which they appear in appellants' brief.

POINT I.

The Circuit Court did not err in striking the Rejoinder.

A. THE REJOINDER WAS SHAM.

Our adversary contends that the affidavit of Agnes Brown stated that the tenant had vacated the premises on or about May 1, 1936 and that this raised a question of fact on the allega-

tion of the reply that the premises were untenanted on April 11, 1936, the date of confirmation of sale. It is true that that factual issue arose but that issue was immaterial. The reply alleged that the premises were untenanted *both* on the date of confirmation (April 11th) and on the date of delivery of the Sheriff's deed (May 5th) (S. C. 38). The defendants' proofs deny the allegation so far as it related to the vacancy on the date of confirmation but admitted the allegation so far as it related to vacancy on the date of the delivery of the Sheriff's deed. The vacancy of the premises on either day was sufficient to overthrow the defense based on the tenant's possession. The defendants' proofs in denial did not go the whole length of the plaintiff's allegation and proof. That denial fell short on a most vital point. The net result was that while the defendants' Rejoinder denied that the premises were vacant when the Sheriff's deed was delivered the plaintiff's *uncontroverted* proofs established the fact of vacancy on that day and the defendants' own proofs admitted it. Thus the shamness of the Rejoinder on that point was demonstrated. That shamness stands also admitted by the statement on page 9 of appellants' brief that "the allegation of the reply that possession was delivered with the deed was not met by affidavit at the time of the argument of the motion".

The Rejoinder denied the allegations of the reply concerning the announcement at the Sheriff's sale. On the motion to strike the plaintiff proved the announcement *and the defendants failed to deny it*. Such failure is also admitted in appellants' present brief before this

Court. On page 9 of that brief appears the following admission:

"The denial in the Rejoinder concerning the announcement made by the plaintiff at the sale was unsupported by defendants at the time of the motion."

Our adversary seeks to justify the sham denial by saying that it had been interposed "in order to provide an opportunity for cross-examination of plaintiff's witnesses on this point at the time of trial". The excuse is as hollow as the denial is sham. Advancing counsel's logic to a conclusion he seems to suggest that one may postpone the hour of judgment by merely denying a proven fact and then claiming the right to probe into that fact by the process of cross-examination. If such opportunity were available to a litigant, then rarely, if ever, could a sham pleading be struck and summary judgment had. The rule relating to the support of pleadings, challenged as sham or frivolous, was stated recently by Mr. Justice Trenchard, speaking for this Court in *Fidelity Union Trust Co. v. Chausmer*, 120 N. J. L. 208. There the pleading under attack was an answer. This Court said:

"Moreover, where, as here, a motion is made to strike an answer or a portion thereof because it is sham or frivolous, or both, the affidavit legally and sufficiently challenging such pleading must be contradicted or rebutted by an answering affidavit or affidavits, so as to raise a dispute as to the facts or law, or both; otherwise, the pleading will be struck. *Pehle v. Saddle River Township*, 119 N. J. L. 156, 194 A. 553. Here there was no sufficient answering affidavit."

Our adversary suggests on page 9 of his brief that he might have pleaded more artfully by stating a "lack of information and belief". With respect to that kind of evasion this Court said in *Fidelity Union Trust Co. v. Chausmer*, *supra*, the following:

"The defendant's answer averred no knowledge or information as to those portions of the complaint which set out the proceedings in the Court of Chancery. This portion of the answer was sham and was properly struck out, and that action was made a ground of appeal * * *."

The reply alleged and the Rejoinder denied that with the Sheriff's deed went full possession of the entire property. The allegation was supported by affidavit which the defendants wholly failed to meet. Obviously, in this material respect the Rejoinder was sham. In this connection we quote from our adversary's present brief (p. 11):

"It is submitted, then, that the only allegations of defendants' rejoinder which are unsupported by sworn proof are those denying the announcement at the sale and that the premises were untenanted at the time of delivery of the Sheriff's deed."

Appellants make point of the fact that the allegation in the reply (par. 4 of reply) that the vendible value had not been affected by the Brown tenancy was denied by the Rejoinder and that that denial was supported by the affidavit of the real estate man, Kemper. The difficulty in which the defendants here find themselves is that the allegation was the statement of a con-

clusion of law and the denial of that statement did not and could not raise an issue of fact. Whether the vendible value was or was not affected depended upon those other facts previously set up in the reply, such as the announcement at the sale, etc. That paragraph 4 of the reply presented a mere conclusion of law is admitted in our adversary's present brief. He says at the bottom of page 3 of that brief:

"The allegation of paragraph No. 4 of the reply (C., p. 38, ll. 20-32) that neither the vendible value of the mortgaged premises nor the bidding therefor was in any way lessened or affected by the tenancy, however, *was a conclusion of law*, and under well settled rules was not within the scope of the admission."

Assuming, however, that the defendants were free to traverse what is admittedly a conclusion of law, what is the nature of the proof which they offered in support of that traverse? They read the affidavit of a real estate man (S. C. 82) who advanced the opinion that a monthly tenancy, *terminating on April 1, 1936*, would adversely affect the bidding at a public sale held the previous day, and this notwithstanding the announcement that the premises are being sold free of the tenancy and that possession would go with the deed. That testimony is inherently improbable and merits no credence in any quarter. It is *contra* all experience, as we hope to show when later in this brief we discuss the effect of the announcement at the Sheriff's sale. The affiant himself must have been aware of

the shallowness of his view, for in his affidavit he dogmatically says that:

“The failure to cut off an interest in the premises by foreclosure, *no matter how small that interest may be*, is an absolute deterrent to careful bidders.”

Evidently the affiant had not been informed by counsel or, being informed, chose to forget the *practical* rule laid down by this Court in the instant case when it reversed the Circuit Court. It may perhaps be better at this point to analyze the several assertions made by the witness Kemper. They appear in three paragraphs on page 83 of the State of the Case.

The first is to the effect that many prospective purchasers of the premises in question might desire to use the property in business and would hence require immediate and complete possession. What the witness means by “immediate possession” is not indicated. Surely, he cannot mean that a purchaser would require possession immediately after the falling of the Sheriff’s gavel. The purchaser knows, or will be held to know that some time must elapse between the sale and the securing of possession. The sale must be reported, it must be confirmed, the Sheriff must draw his deed and the purchaser must pay the price and comply with the conditions of sale. The purchaser also understands, or will be held to understand, that even after he gets his deed there may be some delay in securing actual possession, as where the owner of the equity, even though he has been joined as a party in foreclosure and been cut off, fails to vacate and it becomes necessary to

remove him by writ of assistance (a proceeding which can be inaugurated only by the purchaser after he secures his deed and which proceeding takes at least six weeks to prosecute to finality). It is, therefore, correct to say that what an execution purchaser invariably expects and has a right to receive is possession within that normal period of time required to remove by writ of assistance those who are bound by the decree of foreclosure and who refuse to yield up the premises. As already indicated that span of time is six weeks following the delivery of the Sheriff's deed. In the instant case the possession was assured to the purchaser by two separate means, each decidedly quicker than recourse to writ of assistance, viz:

(1) Complainant in foreclosure, having already served on the tenant a notice to quit, knew that the tenant was summarily removable and complainant, therefore, represented as *one of the conditions of sale* that possession would accompany the delivery of the deed. As was said by Judge Smith, the purchaser "could rely on the announcement at the sale and would not be obliged to carry through his purchase if possession was not delivered to him on the delivery of the deed" (S. C. 94). Thus the bidders were made to understand that the property would be delivered to them sooner than would be the case if possession had to be achieved by writ of assistance against a party who, though cut off by the decree, persisted in holding on.

(2) If any prospective bidder knew of Brown's monthly tenancy he must also be held to have known that upon taking the

deed there would arise by operation of law (Sec. 1 of the Conveyance Act, Comp. Stat. 1534) the relationship of landlord and tenant between himself and Brown and that the tenancy was thereafter terminable on 30 days' notice to quit and that after such notice summary proceedings, taking about 7 days, would lie. By such means possession would be secured sooner than by writ of assistance against a party who had been joined and been cut off by the decree of foreclosure.

The witness Kemper also says that failure to cut off by foreclosure any interest, "no matter how small that interest may be", absolutely deters bidders, and this although it would have been possible to evict Brown "*speedily and simply*". He explains this by saying that possibly troublesome litigation would arise if the tenant proved recalcitrant. The witness' argument is specious. Is not a proceeding for writ of assistance a bit of "troublesome litigation"? Yes, the necessity of resorting to that measure does not excuse the purchaser from completing his purchase, nor does it absolve obligors from their liability. A rather illuminative case was recently decided by Vice Chancellor Bigelow in *Fidelity Union Trust Co. v. Gerber Bros. Realty Co.*, 123 N. J. Eq. 511. Complainant brought suit in Chancery for a mortgage deficiency against three obligors and an assuming grantee. The defendants there, as the defendants here, pleaded that two tenants had not been joined in the foreclosure suit. That was so but nonetheless a writ of assistance had issued against them. Their eviction under the writ was held to satisfy the rule that the security must be

exhausted. The Vice Chancellor said (at p. 513):

"The defendants, citing *American-Italian Building and Loan Association v. Liotta*, 117 N. J. Law 467, and *Polish Home Building and Loan Association v. Burinefsky*, 119 N. J. Law 1, plead that two tenants named Zabarsky, occupying part of the mortgaged premises, were not joined in the foreclosure suit. Although the foreclosure record shows that they were not parties, it also discloses that after complainant had bought in the property, it applied for and obtained an order for possession and then a writ of assistance directed against the Zabarskys. The order for possession recites that the final decree had absolutely debarred and foreclosed them. It matters not how they were bound—perhaps because they held under a lease which could have been, but was not, recorded. Rev. Stat. 2:29-27.

"Delivery of possession is normally essential to the transfer of a good title and a vendee may reject title not accompanied by immediate possession unless the agreement be otherwise. An existing tenancy, not cut off by foreclosure, may deter bidders. For these reasons, the court of errors and appeals has held that lessees must be joined as defendants in the foreclosure suit and that this is a condition precedent to the right to proceed on the bond.' *Stratford Building and Loan Association v. Wagner*, 122 N. J. Eq. 452. But in the present case, the tenancy was cut off by the foreclosure and the purchaser acquired the right to immediate possession. So the rule was satisfied. *Harvester Building and Loan Association v. Elbaum*, 119 N. J. Law 437."

The witness Kemper further opined that the announcement at the Sheriff's sale "was of *little* importance". By that statement he concedes that the announcement was of *some* importance but does not reveal the nature or extent thereof. He suggests that because the announcement is unusual a purchaser might "scent trouble". He does not indicate what trouble might be scented from an announcement the only effect of which is to aid in intelligent bidding, spares the bidder the necessity of making independent inquiry and also assures to him that what he is actually buying is that which the decree directed be sold, viz., the title to the property, coupled with possession. *The defendants offered no evidence that anyone present at the sale knew of Brown's monthly tenancy, shortly to expire.* If such person knew of the tenancy then the announcement of the sale constituted a representation that the encumbrance would be out of the way before the Sheriff delivered his deed. As it actually turned out, Brown's tenancy, no matter when it ended legally, was actually out of the way before May 5th. On the other hand, if any person at the sale did not know of Brown's tenancy then surely his bidding was not affected by the unknown fact. Either way one looks at it, the situation is no different than where a vendor agrees to convey free of encumbrances, not revealing the existence of encumbrances, which are, however, eliminated before tender of deed. Our own courts have gone so far as to hold that specific performance would be decreed against the vendee even though the undisclosed encumbrances existed on the day fixed for performance but ceased to exist before entry of final decree, unless time is of the essence. In

the latter situation the vendor must remove encumbrances before the time fixed for performance. We rely upon the following cases:

- Gerba v. Mitruske*, 84 N. J. Eq. 141
(E. & A., Opinion by Chief Justice Gummere);
Cavanna v. Brooks, 97 N. J. Eq. 329
(E. & A.);
Oakey v. Cook, 41 N. J. Eq. 350, 364;
Moore v. Galupo, 65 N. J. Eq. 194;
Agens v. Kock, 74 N. J. Eq. 528.

In *Gerba v. Mitruske*, 84 N. J. Eq. 79, the vendee resisted performance on two grounds, one being that at the time the agreement of sale was made the property was subject to a *subsisting lease*. Vice-Chancellor Howell pointed out that that lease *subsequently expired* by its own terms and that, therefore, there was nothing in the way of specific performance. As to this defense by the vendee this court, on appeal, said that it was "entirely content with the disposition of it made by the court below, and have nothing to add to what was said by the vice-chancellor in the memorandum opinion filed by him". Affirmance in 84 N. J. Eq. 141 at 144.

In *Goddard v. Jeffreys*, 51 L. J. Ch. 57, the vendor represented that the premises agreed to be conveyed yielded certain rents. Those rents were not as represented at the time, but before the date fixed for performance arrived the plaintiff raised the rents so to be as represented. Specific performance was granted, the Court holding that the defendant vendee had suffered no prejudice, the Court making the test the condi-

tions which existed on the date when the deed was delivered.

Our adversary heretofore contended that at the Sheriff's sale neither the Sheriff nor the complainant can add conditions or terms not provided for in the decree. There, he erred, for the announcement made by complainant's solicitor added nothing to the decree. On the contrary, it was in conformity with the decree. The decree directed the premises to be sold. Nothing being said about tenancies the presumption is that the premises were to be so sold that the purchaser by his deed would take a fee simple free of encumbrances and possessory rights in others. What the complainant's solicitor did was to say to the buying public that that is exactly what the purchaser would get, informing the bidders that with the Sheriff's deed would go possession and *inferentially* assuring the bidders that if any tenancies presently existed they would be put to an end before the purchaser was tendered the Sheriff's deed. Such an announcement is not objectionable. In *Luker v. Fitzer*, 177 N. Y. Supp. 559, the selling referee in foreclosure announced at the sale the existence of a tax title *which had not been cut off by the foreclosure* and mention of which appeared nowhere in the proceedings. This announcement was challenged as being a departure from the directions of the order of sale. The New York Court said that "the customary and usual practice on the part of referees in mortgage foreclosure cases, of stating the condition of the title in the terms of sale, when it is fairly and truthfully done, is not only not to be condemned, but is to be commended. *Otherwise bidders must search the record as a preliminary to intelligent bidding*". The Court further said

that "what could pass by the foreclosure sale was what purported to be sold and must have been so understood by the purchaser. No wrong is done in requiring him to pay for exactly what he bought."

Now, while it is true that the last cited case involved the effort of the purchaser to escape his commitment and did not involve the effort of an obligor to escape the obligation of his bond, yet the case is much in point. The New York Court dealt with the effect upon the bidder's mind of an announcement concerning the existence of an encumbrance not involved in the foreclosure and not cut off by the decree of sale. The Court's holding is not only an approval of the practice of making such announcements, since it furthers intelligent bidding, but is also a clear holding that what the bidder buys is that which by the decree and the announcement is represented as the thing sold.

Applying the holding in the last cited case to the facts in the instant case, is it not clear that what bidders bid for and what the purchaser bought was a title which, according to the terms of sale, would upon vesting carry with it the full and actual possession of the property sold? That understanding was met and the representation was carried out and fulfilled when Brown vacated the premises and when with the Sheriff's deed went the full possession.

It therefore remains to consider when the title purchased at foreclosure sale actually vests. The general rule is that "the foreclosure purchaser is entitled to the possession of the premises immediately upon the vesting of his title" (41 C. J., p. 997, sec. 1453, and cases there cited). Of

course, the title does not vest until the Sheriff makes conveyance. Until then the purchaser has only a vendee's equitable estate.

It seems to us that the only purpose sought to be served by the affidavit of the real estate manager, Kemper, was to show the psychological effect upon the minds of bidders of announcements made at Sheriff's sales. That this may not be done was held by the Court below and is elsewhere in this brief discussed. However, it will be observed that nowhere in his affidavit does Kemper exhibit any special expert qualification with respect to the effect on a bidder's mind of an announcement such as was made at the Sheriff's sale here. He states that his work has consisted of "managing, appraising and selling real estate". He also says that he is "familiar with market conditions and market values of real estate in Newark and vicinity". An experience in managing, appraising and selling real estate is far from indicating any experience at judicial sales. This witness on psychology does not indicate that he ever attended a foreclosure sale or ever participated or assisted in bidding at an auction sale or has had any experience revealing to him the reactions had by bidders when assuring announcements are made. We therefore submit that if an expert's opinion on such a question is at all admissible it was in the instant case properly rejected by the Circuit Court, for the witness was incompetent—he exhibited no such qualifications as related to the subject under investigation.

Finally, our adversary's complaint is that the Rejoinder should not have been struck because

some of the plaintiff's allegations were in issue and that the plaintiff's motion was addressed to the Rejoinder as a whole. The fallacy of his position is so apparent when we consider that *enough* of the material allegations of the plaintiff's reply and supporting proofs were either admitted or were not controverted that the plaintiff's right to recover was removed from controversy. Reference is made by counsel to the language of Mr. Justice Heher in *Kamm v. Flink*, indicating that the power to strike out a pleading as frivolous or sham will not be exercised unless its objectionable character clearly appears. That language has strong application to the case at bar. The frivolous and the sham nature of the Rejoinder ~~were~~^{was} not only made clearly to appear but was demonstrated by the defendants' own admissions. In that same quoted language appears the statement of the rule upon which we rely, that where the matters set up in affidavits submitted on a motion to strike are not controverted the Court is justified in striking. This statement is in essence no different than that furnished by Mr. Justice Trenchard in *Fidelity Union Trust Co. v. Chausmer*, *supra*.

It is therefore submitted that the proofs before Judge Smith demonstrated that the defendants' Rejoinder was sham with respect to material denials and that with respect to other matters in controversy the Rejoinder was wholly frivolous since those other matters were immaterial. An instance of such immaterial, and therefore frivolous, controversy is the dispute as to whether Brown's tenancy ended on April 1st or May 1st or whether he got out the first week in April or on May 1st. Those questions

amount to nothing in the light of the established and admitted fact that he vacated *before* May 5, 1936 on which later day possession accompanied the Sheriff's deed, all as represented in and by the announcement read at the Sheriff's sale.

For the reasons shown it is submitted that the Rejoinder was properly struck as being sham.

B. THE REJOINDER WAS FRIVOLOUS.

The Rejoinder being sham it matters not that it was also frivolous. That it was so with respect to immaterial allegations was discussed and shown under subdivision "A" of this point.

POINT II.

The Circuit Court's determination was dispositive of the whole case.

Under Point Two of his brief our adversary presents three points. In reply we follow their sequence.

A.—THIS COURT EXPRESSED NO OPINION ON MATTERS PRESENTED BY THE REJOINDER AND THE MOTION TO STRIKE.

When this Court spoke on the first appeal the pleadings were in the following posture:

Complaint
 Answer
 Plaintiff's Reply
 Defendants' Motion to Strike Reply.

Before plaintiff's reply no issue had yet been raised concerning the effect of the monthly tenancy on the vendible value or the bidding. The complaint did not anticipate any such defense nor did the answer assert that the Brown tenancy deterred any bidders. The answer asserted the single defense that by the omission of the monthly tenant the mortgagee had failed to exhaust the underlying security. The theory of the answer was that the *mere* omission, without regard to any other attendant circumstances, precluded recovery on the bond. So Judge Porter thought on our motion to strike the answer (see Opinion, p. 33 of S. C.). Thereafter plaintiff's reply set up the circumstances attending the sale, the announcement made thereat, and the further fact that with the deed went possession. On the motion to strike that reply Judge Porter adhered to his earlier view and regarded the omission as fatal (S. C. 45). He did not regard the new facts presented by the reply as changing the legal situation and he said so (S. C. 46). In this he erred. In reversing the Circuit Court this Court could do no more than remit the cause to be proceeded with as is the practice at *nisi prius*. We emphasize the fact that when the case was before the Appellate Court the cause was not yet at issue, for the defendants had not yet met the matter appearing for the first time in the plaintiff's reply. Conceivably they might deny the announcement at the sale, and might even deny that when the Sheriff delivered the deed possession immediately followed. The defendants' attitude on these matters was not determinable in advance of the filing of the Rejoinder. When this Court said that "the

allegations of the reply supported by affidavits may or may not be true" and that an issue of fact was raised, it could mean only that an issue arises if the facts are controverted. When it was suggested in this Court's opinion that the issue had to be tried all that could have been meant was that the issue, *if* it arose by the pleadings, should be submitted to the trier of the facts. It could not have intended that the cause be submitted to the jury even though by their Rejoinder the defendants admitted enough material allegations entitling the plaintiff to a recovery. Nor could it have been intended that the case go to the jury if the defendants' denials (contained in their Rejoinder) were struck down by a motion and supporting proofs, unmet by the defendants. It seems, therefore, plain that what this Court said about a trial of the facts could not and did not relate to a state of pleading and proof not *then* yet arisen. It is also plain that what this Court said on the point presupposed that when *all* the pleadings were in and all motions to strike were heard, there still remained controverted facts requiring a jury's finding. For those reasons this Court remitted the cause to the Circuit to be there proceeded with in accordance with the practice of the Circuit Court.

It is for the foregoing reasons that Judge William A. Smith said in his opinion the following (S. C. 94):

"In this determination I am mindful of the fact that the opinion of the Court of Errors and Appeals in this case in reversing the granting of the judgment for the defendants states:

"We are of the opinion that they (allegations of the reply) raised an issue of fact as to whether the presence of this tenancy under the surrounding circumstances did affect the vendible value of the mortgaged premises by deterring bidders."

"But the matter is in a different position presented now to me than it was as presented to the Court of Errors and Appeals. Since the determination by the upper court a rejoinder has been filed to the reply which, under the affidavit submitted, does not raise an issue as to any fact which might be in dispute but merely sets forth an opinion of a real estate expert as to the effect that the tenancy would have upon the vendible value of the property and the bidding at the sale. This, as I have stated, I do not think raises an issue of fact to submit to a jury."

It will be noted that the issue as to the effect on vendible value was raised not by complaint and answer but by reply and rejoinder. In the reply the plaintiff pleaded that the vendible value had not been affected and alleged the reasons therefor. The Rejoinder went in denial. Thus, plaintiff's first opportunity to move to strike was against the Rejoinder and the defensive matter therein contained. In its defensive character the Rejoinder was essentially an answer. No authority need be cited that a sham or a frivolous answer may be struck. The same is equally true of any defensive pleading. Under Rule 40 of the Supreme Court demurrers are abolished and provision is made for striking "*any pleading*" by a motion. That rule further

provides that any question raised by such motion may be determined before trial, "*and if the decision be decisive of the whole case the Court may give judgment for the successful party or make such order as may be just*".

Our motion was decisive of the whole case since the defendants failed to controvert by proof the fact of the announcement at the sale and its fulfillment upon the delivery of the deed. If the lower court was right in point of law what was there left to be submitted to the jury? The controversy had resolved itself into a question of law upon which the Judge, and he alone, could pass. These are the considerations which moved the Circuit Court Judge to say in his opinion (S. C. 91):

"I take it that if my determination on this motion is decisive of the whole case and there is no issue of fact involved I may direct summary judgment * * *"

Also (S. C. 94):

"I therefore cannot see that there is any disputed issue of fact to submit to a jury; and the motion of the plaintiff should be granted."

B.—THE ANNOUNCEMENT AT THE SALE AND ITS FULFILLMENT IS CONCLUSIVE AGAINST THE DEFENSE.

On page 15 of his brief our adversary argues that the announcement was not conclusive. He quotes from the first opinion of Judge Porter to the effect "that the sale was not in fact or in law free from that tenancy even though so announced". Judge Porter's statement must be

understood in the light of the view he *then* entertained that any omission from the foreclosure suit of a monthly tenant was fatal to a subsequent recovery against the obligor, and that this rule admitted of no exception or qualification. That being the notion *then* entertained we can well understand that Judge Porter did not accept the "announcement" as curtailing the rule. It was his adherence to that notion which later resulted in the reversal of the summary judgment awarded by him to the defendants. Since then the atmosphere has been fully cleared by this Court's opinion in the instant case. That opinion points out (S. C. 52) that the additional facts presented by the plaintiff's reply (one of which facts was the announcement at the Sheriff's sale) did, if true, free the instant case from the force of the *Liotta* case. Later in its opinion (S. C. 55) this Court spoke of the announcement as one of the pertinent facts to be considered and found in determining whether Brown's tenancy did or did not affect the vendible value by deterring bidders. Thus, by the authority of our Court of last resort it seems settled that an announcement, such as admittedly was here made, distinguishes the case from the *Liotta* case where this Court dealt with a *mere* non-joinder of parties and had no other facts before it to show that that non-joinder had been neutralized and rendered meaningless. In quoting from the first opinion of Judge Porter our adversary seems to rely upon that which this Court has already pronounced to be error.

Defendants make the point that it was impossible for the Sheriff to sell the property free of Brown's tenancy. If by that is meant that

the Sheriff could not actually terminate the tenancy on the date of vendue, the argument is conceded. But it does not follow that the Sheriff might not undertake to sell that which by the decree he is required to sell, assuring to the purchaser that between the date of vendue and the date the purchaser would be required to perform full possession would be obtained and that possession turned over with the deed. The decree of sale being silent on the subject of possession, the buying public would be justified in assuming that possession would accompany the delivery of the deed. By the announcement made at the sale the Sheriff did nothing to qualify or disturb that expectation. On the contrary, he announced that which the bidders had a right to assume, that possession would be given with the deed. This is altogether different from any announcement that seeks to charge the property with an added lien or seeks to impose upon the bidder an enlarged liability. We are well acquainted with those cases which condemn what are called "chilling terms of sale". Such terms of sale are designed to discourage bidding by imposing conditions or requirements which shake off competitive bidding. Such a term of sale was the one dealt with by the Chancellor in the very early case, cited by our adversary, *Stevenson v. Black*, 1 N. J. Eq. 338. That case furnishes no comfort to the appellants. *There* after the successful bid had been received the Sheriff injected into the terms of sale a condition by which the purchaser might be subjected *in personam* to the liability of a number of outstanding bonds. Very soundly the Court there said that the Sheriff had undertaken to create a liability which the law had not imposed. In the

later case of *Pinnel v. Boyd*, 33 N. J. Eq. 600 at 603 this Court, speaking by Mr. Justice Dixon, defined the duty of the Sheriff as one to sell the property in the interests of the defendant and of the foreclosing mortgagee, for the best price it will bring and that he may not impose conditions restricting the purchaser's rights. But the Court there held that the Sheriff might at the auction declare that he was selling subject to prior encumbrances and that such declaration is "a mere notice, which he may fairly give, to apprise persons of what claims may be made against the title he conveys". See also *Hackensack Water Co. v. DeKay*, 36 Eq. at 555 (E. & A.).

What the Sheriff did in the instant case was to apprise the bidders present of what ultimately became an accomplished fact, viz., *that no tenant's possession would survive the delivery of the deed*. The effect of this announcement was not to "chill" bidding but to stimulate it, for if the presence of a monthly tenancy adversely affects bidding (which is contra to all experience) certainly the Sheriff's announcement that no such tenancy will endure removes all hesitancy and helps produce the better price.

The defendants strain at a gnat and they are driven to argue that any interest "no matter how slight", not cut off by the foreclosure suit, exonerates and absolves the obligor upon the faith of whose promise the loan was made. Happily this is not the law. This Court's earlier opinion in the instant case should have put such contentions at rest. The real question in these cases is always whether as a *practical* matter the omitted interest deterred bidding. Suppose, for example, complainant's counsel foreclosing a

See also
 LUKER v. FITZER,
 177 N.Y.Sup. 559
 discussed on p.
 22 of this brief.

\$50,000 mortgage omitted to join a judgment-creditor or a mechanic's lien claimant holding a \$50 lien. Suppose further that that omission were discovered by counsel immediately before the sale and he announced to the bidders present that that encumbrance would be removed before the purchaser would be required to complete the purchase. Suppose further that promise were kept and that on the day the Sheriff delivered his deed the judgment or lien claim were actually cancelled and out of the way. Could the obligor rationally advance the claim that bidders had been deterred?

Then again, suppose in the case last assumed the \$50 encumbrance had not been discharged before delivery of the deed. It might then be reasonably argued that the bidding was adversely affected to the extent of the encumbrance, viz., \$50. That amount and no other would measure the injury to the obligor. Would it be just that he escape his \$50,000 liability because forsooth he had been hurt to the extent of \$50? In the case at bar the defendants did not undertake to prove to what extent, if any, the bidding was adversely affected. Obviously no clean-hearted expert could conscientiously say that the Brown tenancy had made a difference of a dollar in the bidding. The plaintiff's decree was for approximately \$15,000. The property brought the usual \$100 on the plaintiff's first and only bid. Does our adversary suggest that the property brought so little because of the monthly tenancy which was about to expire and which was actually non-existent when the deed was delivered, as had been announced and proclaimed by the Sheriff? These questions are projected in order to demonstrate the emptiness and sham-

ness of the claim that the tenancy was of influence on the bidding. It seems to us that it was incumbent upon the defendants to show to what extent, if any, the bidding was adversely affected, so that only to that extent there would be an abatement in their liability. That they utterly failed to do.

C.—BROWN'S TENANCY DID NOT
SURVIVE THE FORECLOSURE.

A foreclosure suit, unlike many other kinds of suits, does not terminate by and with the entry of the final decree. For centuries the traditional form of decree of foreclosure has not in and of itself operated to foreclose the equity of redemption. Only the sale under the decree produces that effect, and it has been the invariable practice of the Chancellor to provide in the decree itself that "It is further Ordered, Adjudged and Decreed, that the defendants stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises, *when sold as aforesaid by virtue of this decree*" (Dickinson's Chancery Precedents, p. 364). Not even the fall of the sheriff's gavel bars the equity of redemption. Nothing short of the Court's order of confirmation and the subsequent performance by the sheriff of the direction to convey produces that result. Considering the nature of the estate of the foreclosed owner between the time of the sheriff's vendue and the time of the delivery of the sheriff's deed, Justice Dixon said in *Marts v. Cumberland Ins., Co.*, 44 N. J. L. at 482:

"Her equity of redemption was not absolutely foreclosed, but was merely suspended,

to be terminated if the purchaser should comply with the conditions of sale; to be restored to full vigor if he failed."

The foregoing view of Justice Dixon was approved by this Court in *Wootton v. Pollock*, 119 N. J. Eq. 128. Such approval is implicit in Mr. Justice Donges' adoption by quotation of the stated language of Justice Dixon. Giving effect to what was said in the *Marts* case and reiterated in the *Wootton* case, it follows that the foreclosure cause persists until the execution purchaser has fulfilled the conditions of sale, and until that event occurs the equity of redemption remains unforeclosed. It further follows that if the purchaser does not comply with the conditions of sale the equity of redemption is, as was said by Justice Dixon "restored to full vigor". A foreclosure cause is open and alive until the last word is spoken, that is, when the sheriff returns the Fi Fa with a certificate complying with the Court's mandate (contained in the Fi Fa) that he certify "of the manner in which you have executed this writ". The cause is kept open, not alone for the sheriff's return to the writ, but also to deal with situations that might arise in the interim, such as a petition in the cause by the purchaser to be relieved of his bid or a petition by complainant or other party in interest to compel the purchaser to complete and perform the conditions of purchase.

The tenancy, the existence of which constitutes a defense to an obligor, must be one that survives the foreclosure, *i. e.*, that exists beyond the delivery of the sheriff's deed, certainly beyond the date of confirmation. We believe that it was

in this sense that this Court said in *American-Italian-B & L v. Liotta*, *supra*:

“It therefore follows when, as here, the possession of the tenant remains undisturbed *after the foreclosure* that there has been neither a complete exhaustion of the property nor an exhaustion of his interest therein. Thus the requirements of the statute remain unsatisfied.”

It is significant that in the *Liotta* case the tenant Holmes was in actual possession of the premises when the Sheriff's deed was actually delivered. Not so in the present case where the tenant was actually out of possession on the day when the sheriff made conveyance. *Certainly Brown's tenancy and all possession thereunder terminated before the foreclosure suit was at an end.* The instant case is, therefore, altogether different from the *Liotta* case, where the tenancy survived the *entire* foreclosure proceeding. This distinction is a very material one, for in the *Liotta* case the purchaser did not acquire possession with the sheriff's deed; in the case at bar he did. The instant case is therefore well within the holding of Vice Chancellor Fielder in *Savoy B & L v. Perrone* (opinion hereto attached) where the omitted tenancy, having terminated *during* the foreclosure, was held to constitute no valid objection to the recovery of a deficiency.

We also press the argument that a mortgagee in possession can create no greater interest than he himself possesses, and that any tenancy or occupancy created by such mortgagee can endure no longer than the mortgagee's own estate and own right of possession. If the rule were other-

wise there would reside in the mortgagee in possession the power to create long term leases, enduring beyond the redemption of the mortgage or the foreclosure thereof. Such leases might well prove so burdensome and disadvantageous as effectually to destroy the value of the equity of redemption. The cardinal rule that one may not confer a greater estate or longer possession than he himself has applies with added vigor to the case of a mortgagee in possession, who is only a constructive trustee for all parties in interest and whose stewardship and dominion over the security exist only so long as his possession as mortgagee continues. The rule is stated in 41 Corpus Juris page 623, Sec. 596, that a mortgagee in possession "*may make a valid lease, although it will necessarily be terminated by the redemption of the mortgage, unless there was some express or implied authority from the mortgagor to lease for a given time.*" This text is supported by a number of English and American cases, cited in the footnote to Corpus Juris, not including, however, any holding from our own State. Logic, however, sustains that rule, and, if it be sound, equally sound is the corollary that a tenancy or occupancy created by the mortgagee in possession necessarily ends when the possession of the mortgagee as such terminates.

It may, in passing, be added that one taking a demise from a mortgagee in possession does so necessarily with the implied understanding that the demise is limited by the limitations of time attending the lessor's estate.

The foregoing considerations justify Judge Smith's added holding when he said (S. C. 95):

"It is also my view that a tenant who holds his tenancy under a mortgagee in possession has no greater rights than the mortgagee, and the foreclosure decree terminates the said tenant's right in the property, and he is subject to be ejected by writ of assistance issued in the foreclosure proceedings, and the purchaser under the sheriff's sale may be put in possession of the property."

This holding is in accord with *Strong v. Smith* hereinafter discussed in detail.

Under Strong v. Smith, discussed on p. 43 of this brief, as decided by this Court and affirmed by the United States Supreme Court, a writ of assistance may issue against a tenant although he was not joined as a party in foreclosure and though he was, therefore, not bound by the decree. This holding applies where the tenant entered pending the suit under ANY of the parties. That is one of the supports to what was held in the last quoted language from the opinion of Judge William A. Smith. It similarly supports the decision of Vice Chancellor Sigelow in Fidelity Union Trust Co. v. Gerber, supra, where the tenants were not joined but nonetheless a writ of assistance issued against them. The point of Strong v. Smith is altogether independent of the effect of any *Lis Pendens* Act by which statutory (constructive) notice is furnished. Strong v. Smith is grounded deeply in the principle that possession, acquired during foreclosure under any party thereto, is necessarily subject to the operation of the writ of assistance. One accepting a monthly tenancy from a mortgagee in possession is put to his inquiry as to his lessor's rights. The simplest of such inquiries would reveal that the lessor's rights exist under a mortgage and that that mortgage is in the process of foreclosure. The tenant's knowledge here is actual and not constructive. The Liotta case was altogether different. There the tenant entered into possession fully two years before the foreclosure bill was filed.

In the instant case if the tenant, Brown, had continued in possession a writ of assistance would have gone against him and that fact would have settled the claim now made by the obligor, even as was settled the like claim made by the obligor in Fidelity v. Gerber, supra. Instead of waiting to be ousted by writ of assistance Brown vacated before the Sheriff's deed was delivered and before the writ could be sought. It is inconceivable that this earlier vacation by the tenant should have given a defense to the obligor where the tenant's later vacation would have prevented such defense from arising.

wise there would reside in the mortgagee in possession the power to create long term leases, enduring beyond the redemption of the mortgage or the foreclosure thereof. Such leases might well prove so burdensome and disadvantageous as effectually to destroy the value of the equity of redemption. The cardinal rule that one may not confer a greater estate or longer possession than he himself has applies with added vigor to the case of a mortgagee in possession, who is only a constructive trustee for all parties in in-

Under Strong v. Gilchrist, discussed on p. 43 of this book, decided by this Court and affirmed by the United States Court, a writ of assistance may issue against a tenant who was not joined as a party in foreclosure and though he was not bound by the decree. In this holding applies the tenant entered pending the suit under WY of the part. That is one of the supports so what was held in the last language from the opinion of Vice Chancellor Stetson in Wright v. Gilchrist, where the tenant voluntarily accepted a writ of assistance issued against the point of Strong v. Gilchrist is altogether independent of effect of any law rendered not by which statutory (constructive) assistance is furnished. Strong v. Gilchrist is grounded deeply in principle and possession, acquired during foreclosure under a mortgage, is necessarily subject to the operation of the law. One accepting a monthly tenancy from a mortgagee in possession is not to his injury as to his lessor's rights. The slightest of such injuries would reveal that the mortgagee's rights exist under a mortgage and that that mortgage is not constructive. The tenant's knowledge here is not constructive. The latter case was altogether different. There the tenant entered into possession fully two years before the foreclosure bill was filed. In the instant case if the tenant, Brown, had continued possession a writ of assistance would have gone against him. It is not settled the date now made by the obligor would have settled the date made by the obligor in Wright v. Gilchrist. Instead of waiting to be ousted by writ of assistance, Brown vacated before the Sheriff's deed was delivered. The writ could be sought. It is inadvisable that the vacation by the tenant should give a defense to the mortgagee where the tenant's later vacation would have prevented a defense from arising.

"It is also my view that a tenant who holds his tenancy under a mortgagee in possession has no greater rights than the mortgagee, and the foreclosure decree terminates the said tenant's right in the property, and he is subject to be ejected by writ of assistance issued in the foreclosure proceedings, and the purchaser under the sheriff's sale may be put in possession of the property."

This holding is in accord with *Strong v. Smith* hereinafter discussed in detail.

We add the following points in support of the judgment under review:

POINT III.

The monthly tenant, Brown, was not a necessary party to the foreclosure.

Underlying the *Liotta* case and other cases in our reports is the fundamental idea that the obligor should not be called upon to respond in a deficiency when that deficiency was produced or increased by the plaintiff's failure to cut off some junior right or interest, the continued existence of which may have adversely affected the bidding at the sale and the proceeds realized therefrom. *But all those cases dealt with rights and interests which existed at the time plaintiff filed his bill to foreclose and which continued to exist to and beyond the foreclosure proceeding.* In the *Liotta* case the omitted tenant, Holmes, was in possession at the time the plaintiff became a mortgagee in possession and the tenant continued in such possession to and beyond the time (two years later) when the mortgagee filed

its foreclosure bill. While the case does not indicate when the tenant, Holmes, vacated, it is fair to assume that his possession endured until after the sale, confirmation and Sheriff's deed, for Mr. Justice Perskie said:

"It therefore follows that when, as here, the possession of the tenant remains undisturbed *after the foreclosure* that there has been neither a complete exhaustion of the property nor an exhaustion of his interest therein."

The italicized words are strongly suggestive of the fact that the tenancy there dealt with survived the complete foreclosure proceeding.

From the cases cited we deduce and advance the principle that a complainant in foreclosure is obliged to join as parties all tenants in possession at the time of the filing of the foreclosure bill and that if he omits so to do no deficiency may be enforced unless the omitted tenancy ceases to exist *after* the filing of the bill and *before the completion* of the foreclosure proceeding.

In *Savoy B & L Assn. v. Perrone* (unreported but see Chancery file 109/487 where opinion is filed) Vice Chancellor Fielder had before him the defendants' claim that complainant should be barred from maintaining its deficiency suit because complainant had failed to exhaust its security by foreclosure "in that tenants were in possession of the mortgaged premises whose rights were not cut off by the foreclosure decree because they had not been made parties to complainant's suit". With respect to this contention Vice Chancellor Fielder said:

"2. The foreclosure bill was filed Feb. 27, 1935, on which date I find that the sole occupant of the building on the mortgaged land, beside Perrone and wife, was a tenant who surrendered his possession by moving out six days later and *thus there was no tenancy existing prior to filing the bill, which had not been cut off. The rights of other persons thereafter in occupancy of the building were subject to complainant's decree under lis pendens filed.*"

Because the opinion of Vice Chancellor Fielder is not reported we print and annex to this brief that opinion in full. By the holding in that case three sound rules of law are established, viz.:

1. That the tenancy required to be cut off by the foreclosure suit must be in existence prior to the filing of the foreclosure bill.
2. That if the holder of such tenancy is not joined in the foreclosure proceeding that nonjoinder ceases to be material if the tenant surrenders possession *during* the foreclosure proceeding.
3. That tenancies created after the filing of the bill are cut off because they are subject to complainant's decree under the *lis pendens* filed.

We take it that it is not the *mere possession* at the time of the Sheriff's sale by a tenant or occupant (omitted from the foreclosure suit) which will defeat the right of recovery against the obligor. It must be more than mere physical possession; *it must be possession coupled with the right thereto*, otherwise if a trespasser entered one day before the Sheriff's sale and remained in possession until a day after the Sher-

iff's sale, the obligor would escape liability. It seems to us that all that is required by law is that the *right to possession* shall either have been cut off by the foreclosure decree or otherwise have been terminated before delivery of the Sheriff's deed. This must be so, else there could be no recovery on the bond in any instance where after sale and deed it becomes necessary for the Chancellor to give possession to the execution purchaser by means of the Chancery writ of assistance. It is a matter of every day occurrence and universal experience that the owner of the equity of redemption, though joined as a party in foreclosure and his rights cut off by final decree, will continue in possession until after the Sheriff's deed is delivered to the purchaser, frequently making it necessary for that purchaser to secure possession by means and force of a writ of assistance. Would a purchaser at a foreclosure sale be entitled to be relieved of his bid upon a showing that the owner of the equity of redemption, who had been made a party to the foreclosure suit, was still in possession? Obviously not, for all that the purchaser bought was the *right to the possession*, a right which he can achieve by writ of assistance or by ejectment. Thus, the discussion resolves itself into a single question, viz: Is the purchaser's title under his deed subject to an outstanding *right of possession* or is that title free of such *right of possession*? In the *Liotta* case purchaser took his deed with a possessory right then still ~~an~~ *outstanding*.

In the case of *Strong v. Smith*, 68 N. J. Eq. 686, at 690, Vice Chancellor Stevenson considered the propriety of allowing a writ of assistance against a person in possession of the mortgaged

premises who had not been made a party to the foreclosure suit. He classified the instances in which possession will be enforced even against one who had not been joined as a party defendant and he held that a writ will go "where the person in possession (though omitted from the foreclosure suit) has entered pending the suit under *any* of the parties". He said (at p. 690):

"4. We now come to the consideration of the different instances in which a writ of assistance will go against persons in possession who have not been made parties to the suit in which the writ is issued. Without undertaking to make an exhaustive enumeration, because such enumerations which purport to be complete are generally dangerous, I think I may mention the following cases:

"(1) *Where the person in possession has entered pending the suit under ANY of the parties.*

"(2) In some cases, at least, I think where such person has entered pending the suit as a mere trespasser.

"(3) Where such person has subjected his title and right of possession to the operation of section 58 of the Chancery act. P. L. 1903 p. 385. * * *"

V. C. Stevenson held the writ in the *Strong* case so that review might be had in the Court of Errors. In the latter Court the allowance of the writ of assistance was unanimously affirmed. In the course of his opinion for this Court Mr. Justice Dixon said (68 N. J. Eq. at 705):

"Of course, it is necessary that the rights of the person from whom possession is sought should in some lawful mode be subjected to

Affirmed in 1906
in U.S. Sup. Ct.,
203 U.S. 584,
51 L.Ed. 328,
27 S.Ct. 782.

the jurisdiction of the court. Ordinarily this is done by making him a party to the suit in which the decree to be enforced is rendered. But it may be done by giving him notice of the possessory proceeding instituted on the basis of the decree, or by his appearance in such proceeding. If, when he is thus brought in, it is clearly shown that he claims *under one who was a party to the suit*, and that his right of possession is undoubtedly subordinate to the right for the enforcement of which the writ of assistance is prayed, *then it may be issued against him, even though technically he is not bound by the decree.*"

Applying the last cited case to the facts here presented it is clear that even if the tenant Brown had not vacated when he did and even if he had actually continued in possession down to May 5, 1936 (date when the Sheriff delivered the deed of conveyance) his possession could have been ended by a writ of assistance. It could also, of course, be ended by a summary suit to dispossess. A writ of assistance would go because, as was said in *Strong v. Smith, supra*, he had entered into possession pending the suit under one of the parties thereto. A summary proceeding against him would have been maintainable because his right to possession had terminated on April 1, 1936, the effective date of the notice to quit, and his possession thereafter was without right.

We summarize the cited authorities and our argument under Point 3 by saying that Brown was not a necessary party to the plaintiff's foreclosure suit for the following reasons:

1. His monthly tenancy was not in existence when bill and lis pendens were filed.
2. He entered possession pending the suit and under one of the parties thereto (complainant).
3. His right to possession terminated on April 1, 1936, the effective date of his lessor's notice to quit.
4. He was actually out of possession before the delivery of the Sheriff's deed on May 5, 1936.

We draw from the cases in our State the view that a Sheriff's sale is analogous to a conditional agreement to sell, the condition being the Court's approval; that when that approval is furnished the sale becomes an unconditional agreement to sell and buy, continuing executory until performance occurs by the Sheriff's delivery of a deed and the purchaser's payment of the bid price. Certain it is that the purchaser's legal estate and his *right to possession* do not arise until the deed is delivered.

Respecting tenancies which arise during the pendency of a foreclosure it has already been shown by our reference to *Savoy B & L v. Perrone, supra*, and *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 to 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 thing 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 fore-

closure. 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 advantage of the obligor and the owner of the equity. Every dollar of rent taken in on such a new letting either increases the ultimate surplus or reduces the ultimate deficiency. When a vacancy occurs, is the foreclosing mortgagee 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 (complainant's) bill and issuing new process. Either course involves unnecessary difficulty. Where the tenancies are many and constantly shifting the complainant would have to amend his bill every time a new letting is made. This might go on interminably, there never arriving a time when complainant 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 the entry of the final decree and the date of sale. Is it not altogether sound and just 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 or occupant enters (as did the tenant in *Strong v. Smith, supra*) 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, f.ifa., 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 taking pending foreclosure a letting from a mortgagee in pos-

session 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 the point of sale and confirmation? It seems to us that both these queries merit an affirmative answer and that in either situation the tenancy and possession created during the foreclosure cannot and does not survive the sale.

We respectfully submit that for the reasons stated Brown was not a necessary party to the complainant's foreclosure suit and that such rights as he acquired during the suit terminated before the foreclosure was completed by sale and delivery of Sheriff's deed.

POINT IV.

Brown's interest was cut off by the operation of the *Lis Pendens* act.

The situation in the case at bar is controlled by the *Lis Pendens* Amendment of 1930, Chap. 119, page 374. Unlike all the earlier provisions relating to *lis pendens* in actions *in rem* the 1930 act provides that the time of the filing of the *lis pendens* shall constitute the moment when it becomes operative as notice. It reads:

"From and after the filing of such notice, any person claiming any title to, interest in, or lien upon such lands through any defendant in such suit, shall be deemed to have acquired such title, interest or lien with knowledge of the pendency of such suit, and shall be bound by any judgment or decree entered therein in the same manner as if he had been made a party thereto and had been

duly served with process to answer such suit. * * *

In the case at bar the lis pendens was filed July 23, 1935 while Brown's tenancy arose the following September 1st.

Our adversary does not question the correctness of our view but he limits it to those instances where the tenant claims under the mortgagor-defendant, not the mortgagee-complainant. This same question was before this Court on the first appeal. Dealing with it our adversary said in his brief:

"Ordinarily, where a monthly tenant enters into possession *through the mortgagor* and the tenancy is created after bill of complaint and lis pendens have been filed, *even though no subpoena has issued, the tenant is bound by the decree.* This is true for the reason that anyone who takes an interest, after the filing of a lis pendens, in premises being foreclosed, and takes said interest through a *defendant* in the foreclosure proceedings, is considered as though he were made a party to the suit."

The point of cleavage between us is not whether a subpoena *ad resp.* must be issued to make the lis pendens effective, for by the foregoing excerpt from our adversary's brief it is apparent that he agrees with us that the subpoena is not necessary. The point of contest between us is whether the Lis Pendens Act applies to one claiming under the mortgagee-complainant. We say it does apply, notwithstanding the fact that the statute speaks of the claim being "through any defendant in such

suit". When a mortgagee enters into possession he enters under the owner's mortgage, which is nothing else than a conveyance upon condition subsequent. The mortgagee's estate is derived from and dependent upon the mortgagor's title. The mortgagee, therefore, claims directly under the mortgagor. When, while in possession as mortgagee, the mortgagee creates a tenancy, the tenant necessarily claims under the original mortgage and through the mortgagee, the latter being an intermediary. When the mortgagee in possession forecloses and joins the owner as a defendant all tenants thereafter created by the mortgagee necessarily claim under the mortgagor-defendant. There is *that* privity between the tenant and the defendant-owner, a privity accomplished by the intervention of the mortgagee's possession. Therefore, the defendant-mortgagors having been joined as parties defendant and the mortgagee having (after the filing of the *lis pendens*) rented to Brown, Brown's tenancy was derived from the defendant-owners and by force of the statute he is bound by the decree of foreclosure in the same manner as if he, Brown, had been made a party in the cause and had been duly served with process to answer the suit. If we are deemed to be in error in this view, the result is not changed materially. If Brown be deemed to claim under the complainant, not the defendants, then he is within the operation of the holding in *Strong v. Smith, supra*, a case affirmed not alone by this Court but also by the United States Supreme Court.

It is, therefore, submitted that Brown's tenancy was cut off by the final decree, and this because of the *Lis Pendens Act* referred to.

*Objectionable Appendix "A", Annexed to
State of Case.*

Appendix "A" consists of a Sheriff's deed which was not before the Court below. It was neither received in evidence nor offered as an exhibit. When it was made part of the State of the Case we immediately served written objections and have since followed up with a motion to expunge that part of the case. It is possible that that motion will not be disposed of before a consideration of the whole case on its merits. We therefore have the following observations to make.

That the Sheriff's deed was delivered on May 5, 1936 was admitted by the defendants' Rejoinder. In their present brief before this Court the defendants admit that "the allegation of the reply that possession was delivered with the deed was not met by affidavit at the time of the argument of the motion" (Appellants' Brief, p. 9). On page 11 of that brief they admit that they had failed to meet plaintiff's allegations and proofs that the premises were untenanted at the time of the delivery of the Sheriff's deed. Their attempt now is to escape the force of their failure in the Court below and of their admissions in the Court above. They exhibit the deed, request this Court to examine it and in their argument (Appellants' Brief, p. 9) they call attention to the fact that the deed was acknowledged on April 17th and they argue that the deed could have been delivered at any time after April 17th and they say that the premises were untenanted at the time of the delivery of the deed only because the purchaser

delayed calling for it more than two weeks after it was ready for delivery. Not only do we consider it highly irregular to exhibit on an appeal documents which were not before the lower Court but we think that the argument introduced by the exhibit depends upon other facts which were not proved or attempted to be proved at the Circuit. It is suggested that the deed was ready on the date of the acknowledgment. There is no evidence that the purchaser was informed of that fact or what time the Sheriff took to inform the purchaser or his counsel that the deed was ready for delivery or what date the Sheriff fixed for the completion of the purchase. All these are usual and ordinary factors in a busy county like Essex and particularly at a time when the Sheriff's office is swamped with foreclosure sales. But aside from this, the whole thing is without point. A two-weeks delay in lifting the deed from the Sheriff is not unreasonably long. Then, too, it was quite the proper thing to delay the taking of the deed until the tenant, Brown, was actually out for by such means the representation made at the Sheriff's sale could be fulfilled.

It is, therefore, submitted that if the objectionable exhibit be not expunged its presence be regarded as wholly irrelevant. How the date of the acceptance of the deed could relate back and affect the question of the earlier bidding is beyond our ken.

Conclusion.

It is respectfully submitted that by their failure to meet with proof on material questions the plaintiff's proofs on the motion to strike, the Rejoinder was palpably sham and was properly struck; that that was decisive of the whole case and that judgment final was properly awarded.

It is also respectfully submitted that by their brief the appellants have exhibited no error and that the respondent has on all its points indicated the soundness of the judicial action under review.

The judgment should therefore be affirmed.

Respectfully submitted,

LEBER & RUBACK,
*Attorneys for and of Counsel with
Plaintiff-Appellee.*

Appeal to be argued by

MEYER E. RUBACK, ESQ.

Opinion, Fielder, V. C.

NOT TO BE PUBLISHED IN ANY REPORT.

Dated—November 2, 1936

IN CHANCERY OF NEW JERSEY.

109-487.

Between

SAVOY BUILDING AND LOAN
ASSOCIATION,
Complainant,

and

ROSARIO PERRONE, et al.,
Defendants.

On Bill &c.
Conclusions.

MR. HARRY T. DAVIMOS for complainant.

MR. FRANK W. HASTINGS and MR. THEODORE
RABINOWITZ for defendants Rosario Perrone
and wife.

FIELDER, V. C.:

On a previous hearing in this cause I filed conclusions stating that the cause of action had resolved itself into a simple suit by complainant as obligee against defendants Perrone and wife as obligors, for a deficiency on a mortgage bond; that because the cause was one for which complainant had a complete remedy at law, the bill should be dismissed and I suggested that defendants might desire to withdraw their counterclaim for a decree discharging them from liability on their bond and directing that the bond be can-

celled. Defendants did not wish to adopt that suggestion and complainant applied for and obtained leave to amend its bill so as to state an offer to give credit on the deficiency for the fair value of the mortgaged premises as of the date of sheriff's sale. To the bill as amended defendants filed an answer charging that complainant should be barred from maintaining its suit because it had failed to exhaust its remedy in its foreclosure suit, in that tenants were in possession of the mortgaged premises whose rights were not cut off by the foreclosure decree because they had not been made parties to complainant's suit. By amended counterclaim defendants repeated the allegations of their original counterclaim, the basis of which was that complainant with knowledge that defendants' grantees had assumed payment of the bond and mortgage, had extended time for payment to the grantees and by said amended counterclaim defendants accepted complainant's offer to credit fair value on the deficiency and alleged that such fair value exceeded the deficiency. They prayed the same relief against complainant as they had prayed before and on all the issues raised the cause came on for re-hearing.

1. I find that defendants failed to prove that complainant had extended time to defendants' grantees for payment of the mortgage debt.

2. The foreclosure bill was filed Feb. 27, 1935, on which date I find that the sole occupant of the building on the mortgaged land, besides Perrone and wife, was a tenant who surrendered his possession by moving out six days later and thus there was no tenancy existing prior to

filing the bill, which had not been cut off. The rights of other persons thereafter in occupancy of the building were subject to complainant's decree under *lis pendens* filed.

3. The decree in foreclosure was entered April 4, 1935 for \$7,964.51 and complainant paid its counsel \$406.44 to cover costs, sheriff's fees and disbursements not taxed.

Complainant also paid \$1,636.79 for arrears of taxes on the mortgaged premises. The testimony as to fair value is, for defendants \$11,890 and for complainant \$6,680. The building in question was originally an old structure to which front and rear extensions were added, making a store on the street floor and living rooms on the two floors above, the result being by no means a modern building. Considering all the evidence as to value, including the fact that defendants were unable to realize sufficient income from the property to enable them to carry the mortgage loan obtained from complainant, I think \$11,890 in excess of fair value. Complainant offered to credit on its deficiency a sum sufficient to reduce the deficiency to \$500 and I find that if to complainant's decree and to the money paid out of it as above stated, interest be added and the total be deducted from the fair value, the difference would show a deficiency of more than \$500 and therefore I shall advise a decree in complainant's favor for \$500 and dismissing defendants' counterclaim.

6 OCT. 7 1938

New Jersey Court of Errors and Appeals

HARVESTER BUILDING & LOAN
ASSOCIATION OF NEWARK, N. J.,
a New Jersey corporation,
Plaintiff-Appellee,

vs.

HANA ELBAUM and SIMON
ELBAUM,
Defendants-Appellants.

Action at Law.

On Appeal from
Essex County
Circuit Court.

Sat Below:

William A.
Smith, C. C. J.

REPLY BRIEF FOR DEFENDANTS- APPELLANTS.

Appellants desire to make answer to some of the points raised by appellee in its brief. Much of appellee's brief is concerned with matters argued fully on the earlier appeal. These matters were not treated extensively in appellants' brief. We reply to the various points *seriatim*. The page reference preceding each point is to appellee's brief.

1. Page 12.

Much is made of the inability of defendants to controvert the allegation that possession was delivered with the deed. We reiterate our position that what happened after the day of the sale is immaterial. The issue of fact here is: What was the effect of the surrounding circumstances on the vendible value of the premises and the bidding at the sale? It was announced at the sale

that possession would be delivered with the deed. That is an important circumstance to be considered. But whether, in fact, plaintiff was able to fulfill that representation matters not at all. No citation of authority is needed for the proposition that the happening of an event on May 5, 1936, could not have influenced the minds of persons bidding at a foreclosure sale on March 31, 1936. Defendants urge most strongly that anything that occurred after the Sheriff's hammer knocked the property down to plaintiff could not have had any possible effect on the vendible value of the mortgaged premises. Any damage that had been done was irremediable after that time.

2. Pages 17-18.

Plaintiff's statement that the Browns could have been evicted by summary proceedings because Section 1 of the Conveyance Act creates the relationship of landlord and tenant between the purchaser at a foreclosure sale and tenants in possession is completely at variance with the law. There is no landlord and tenant relationship under such circumstances. *Al Eitner, Inc. v. McGuire*, 9 N. J. Misc. 205, 153 Atl. 372.

3. Pages 18-19.

The case of *Fidelity Union Trust Co. vs. Gerber Bros. Realty Co.*, 123 N. J. Eq. 511, is not in point in this case. It appears that the tenants there were, in some manner not evident from the opinion, subject to the operation of the foreclosure decree, and it was therefore possible to evict them by means of a writ of assistance. In his opinion, Vice-Chancellor Bigelow reasons that because the writ of assistance issued, the tenants must have been cut off by the foreclosure, even though not parties thereto. Indeed he says,

"The order for possession recites that the final decree had absolutely debarred and foreclosed them. It matters not how they were bound—perhaps because they held under a lease which could have been, but was not recorded. Rev. Stat. 2:29-27." The rule of the *Liotta* case was satisfied. The failure to join a tenant will not enable the mortgagor to escape his obligation on the bond if the tenant by some other means is subject to the operation of the foreclosure decree. That is the holding of the *Gerber* case. The difference between that case and the present case is that here the tenants Brown were not cut off by the foreclosure and could not have been evicted by a writ of assistance.

4. Page 22.

Plaintiff says,

"Nothing being said about tenancies (in the decree) the presumption is that the premises were to be so sold that the purchaser by his deed would take a fee simple free of encumbrances and possessory rights in others. What the complainant's solicitor did was to say to the buying public that that is exactly what the purchaser would get, informing the bidders that with the Sheriff's deed would go possession and *inferentially* assuring the bidders that if any tenancies presently existed they would be put to an end before the purchaser was tendered the Sheriff's deed."

The argument is, that the announcement added nothing to the decree, but was in conformity therewith. It is quite true that the decree and fi fa said nothing about possession and tenancies. However, those instruments must be read in the light of the proceeding upon which they were based. The possession of the Browns in the mortgaged premises was notice to the world of any

interest they might have. A purchaser at the sale, though the decree and *fi fa* were silent upon the subject, would know that the Sheriff must sell subject to the interest of the Browns, whatever it might be. The Browns had not been parties to the foreclosure. The announcement, therefore, altered the decree and *fi fa* in a material respect. It purported to sell the premises free of an existing encumbrance. The buying public was thereby offered something which it would not have expected after an investigation of the foreclosure proceeding. The announcement was not a mere statement of the condition of the title, which is always unobjectionable. On the contrary it was a representation that a different title than that produced by the foreclosure would be sold.

This same problem is further discussed on pages 31-33 of plaintiff's brief.

"Defendants make the point that it was impossible for the Sheriff to sell the property free of Brown's tenancy. If by that is meant that the Sheriff could not actually terminate the tenancy on the date of vendue, the argument is conceded. But it does not follow that the Sheriff might not undertake to sell that which by the decree he is required to sell, assuring to the purchaser that between the date of vendue and the date the purchaser would be required to perform full possession would be obtained and that possession would be turned over with the deed."

Plaintiff appears to be under the impression that the decree required a sale free of all tenancies. This is not so. Purchasers at foreclosure sales are given a right by statute to refuse a title which is not marketable. 4 Comp. Stat. 4686, Sect. 35. But that does not authorize the Sheriff to sell a marketable title in every case. He sells the title made by the foreclosure, as is, with all its imperfections, if any there be. If the purchaser

later elects to disavow his bid he may do so, if the title is in fact unmarketable. The announcement by plaintiff sought to produce a very different situation. The endeavor was made to sell a presently imperfect title as though it were a perfect title. It is submitted that this proceeding was illegal and improper.

5. Page 24.

Plaintiff attacks the qualifications of defendant's expert real estate man, Kemper. It is submitted that the point is not well taken at this time. The weight of an expert's qualifications goes to his credibility, not to the admissibility of his testimony. The affidavit shows sufficient knowledge and experience to make it admissible, and it was perfectly competent evidence on a motion to strike.

May we further point out that at an earlier stage of this litigation plaintiff found it necessary to file just such an affidavit. We quote the recital of qualifications in the affidavit of Stavitsky, plaintiff's real estate expert (C., p. 42):

"I am in the real estate business in the City of Newark and have been so engaged for 15 years. I have during those years been acquainted with market conditions and market values of real estate in the City of Newark."

Plaintiff is scarcely in a position to complain of defendants' expert. For aught that appears he was better qualified than its own.

6. Pages 26-30.

Point II-A of plaintiff's brief is devoted to an analysis of the opinion of this Court on the previous appeal. Issue is taken with defendants' argument that the reply was a negative pleading and required no rejoinder to place the case at

issue. It is said that this Court's language, "the allegations of the reply may or may not be true" referred to the situation that would be raised when defendants' next pleading was filed, and that the issue of fact spoken of would exist only if the allegations of the reply were controverted. The difficulty with this is that it ignores the admissions made by defendants on the previous appeal. If this Court were of the opinion that an issue of fact would exist only if defendants denied the allegations of the reply would it have said, "they (referring to the allegations of the reply) raised an issue of fact"? An issue of fact cannot be raised on a pleading not yet filed. It is clear that the issue was raised on the answer. Plaintiff continues to exhibit a fundamental misunderstanding of the opinion of this Court. The issue spoken of was whether or not the vendible value of the mortgaged premises had been affected by the failure to cut off the Browns' tenancy. The issue was not whether the circumstantial allegations of the reply were true. Admitting all the circumstances, the announcement, the character of the tenancy, the delivery of possession with the deed, the question of their effect on the bidding at the sale remained. The striking of the rejoinder, then, was not dispositive of the whole case. The case was thereafter in no different position than when last presented to this Court. And at that time a triable fact question was present.

7. Page 33.

Plaintiff declares that defendants "strain at a gnat", and are driven to argue that any interest no matter how slight, not cut off by the foreclosure suit, absolves the obligor upon the bond. It is further said that the real question is whether as a practical matter the omitted interest deterred bidding. Defendants' argument is inaccurately

paraphrased. We contend only that the failure to cut off the interest of the Browns, as a practical matter, adversely affected the vendible value of the premises. The narrower question on this appeal is whether the effect of the tenancy upon the bidding and the vendible value, under all the circumstances, was one for the Court, or one for the jury. If defendants strain at a gnat, plaintiff is guilty of the equally reprehensible fault of taking a whole hand, when given a finger. On the previous appeal a summary judgment in defendants' favor was reversed and plaintiff given the opportunity of presenting its case to a jury. On the identical facts, it now argues that it was entitled to a judgment as a matter of law. The example on page 34 of a \$50.00 encumbrance remaining after the foreclosure of a \$50,000.00 mortgage proves nothing. Any rule of law may be attacked by citing borderline problems. Suppose the encumbrance not cut off was \$45,000.00? The example then aids defendants' contention. But rules of law must control every case impartially. Here there cannot be one rule when the encumbrance is minute and another when it is large. In each case it is a question of fact, whether, as a practical matter, there was any effect upon the vendible value, which it is the province of the jury to determine.

8. Pages 35-37.

Plaintiff's point II C is that the Browns' tenancy did not survive the foreclosure. The substance of the argument is that in order for a tenancy to have any fatal effect upon a deficiency suit it must be in existence *after* the foreclosure, that a foreclosure is not completed until the deed is delivered, and that the Browns were out of possession when the deed was delivered. Reli-

ance is placed on the language of the *Liotta* case and on the unreported case of *Savoy B. & L. vs. Perrone*. It should be noted that in the *Liotta* case it was unnecessary for the Court to draw the line any finer than to say generally that the possession of the tenant was undisturbed after the foreclosure. In the *Perrone* case the tenant vacated *during* the foreclosure, actually six days after filing of the bill. A foreclosure has several stages. Because on the particular facts of the *Perrone* case the possession of a tenant who moved out *during* the foreclosure was insufficient to affect the vendible value of the premises, we cannot draw a rule that the possession of any tenant who moves out *during any stage* of a foreclosure proceeding is similarly ineffective. Again it must be emphasized that the controlling date in the foreclosure proceeding for the purpose of determining whether compliance has been had with the Vail Act is the date of the sale.

Though it is true that for some purposes a foreclosure is not complete until the deed is delivered, yet the delivery of the deed relates back to the time of the sale. In *Union B. & L. Ass'n. vs. Childrey*, 97 N. J. Eq. 20, it was said (at p. 24) :

“The order of confirmation confirms and has relation back to that sale, and the delivery of the sheriff’s deed is a mere ministerial act which the officer is required to perform to consummate the sale and vest in the purchaser the legal title in compliance with the law under which the sale is made. The sheriff’s deed, when delivered, also has relation back to the time of the public sale.”

It is thus seen that the title given by the Sheriff’s deed is a title as of the date of the sale; the purchaser is entitled to the property as it was on that day; he can demand no more, he can be forced to take no less.

We concede that if a tenant vacates before the sale the failure to join him can avail the mortgagor nothing. But if he is in possession on the date of the sale, though he vacate one day later, a question of fact is raised as to the influence of his possession upon the vendible value of the mortgaged premises.

9. Pages 37-39.

Plaintiff contends that a mortgagee can create no greater estate than he himself possesses and that hence his leases terminate when his possession as mortgagee terminates. Here again plaintiff cites an admitted rule of law but applies it to the wrong situation. It is true that an estate created by the mortgagee is terminated by the exercise of the equity of redemption. To that extent the mortgagee's estate is conditional. As against all persons who have no right to redeem, however, the mortgagee has an absolute estate. His leases are good against the world, with the exception mentioned, and they will survive the foreclosure of his mortgage. He cannot in one breath grant a portion of his estate to a tenant, and in the next nullify his demise by asserting his right to foreclose. Certainly his lessee could never be cut off without his day in court, to the extent of being a party to the foreclosure.

10. Pages 39-41.

To establish the point that the Browns were not necessary parties to the foreclosure plaintiff leans heavily on the *Perrone* case. It relies blindly on the language of the opinion of Vice-Chancellor Fielder without correlating the language to the facts of the case. Three "rules" are deduced from the case:

"1. That the tenancy required to be cut off by the foreclosure suit must be in ex-

istence prior to the filing of the foreclosure bill.”

It does not appear in the *Perrone* case that any tenant went into possession between the filing of the bill and the issuance of process. That is the situation here. And a foreclosure suit is not commenced until subpoena issues. *Kocher's Chancery Precedents*, Section 787; *Haughwaut v. Murphy*, 22 N. J. Eq. 531; *Walker v. Hill*, 22 N. J. Eq. 513; *Vineland Nat'l Bank v. Shinn*, 55 N. J. Eq. 415; *Metropolitan Life Ins. Co. v. Lodginski*, 188 Atl. 681. The true rule then is that a tenancy must be cut off if it is in existence prior to the filing of the foreclosure bill *and issuance of process*. Further, we submit that it can in no case be cut off, no matter when it arises, if the grant is made by the mortgagee in possession.

“2. That if the holder of such tenancy is not joined in the foreclosure proceeding that nonjoinder ceases to be material if the tenant surrenders possession *during* the foreclosure proceeding.”

With this rule we find the fault that the word “during” is too broad. The surrender, in order to cure the defect, must be during the foreclosure *and before sale*.

“3. That tenancies created after the filing of the bill are cut off because they are subject to complainant's decree under *lis pendens* filed.”

The *Lis Pendens Act*, P. L. 1930, page 374, provides that the filing of notice shall make the decree binding on any person who acquires an interest in the lands thereafter “*through any defendant in such suit*”. The Browns took through the complainant in the foreclosure and hence were not

subject to the *lis pendens*. Once more the rule deduced by plaintiff is too broad.

11. Pages 41-42.

Plaintiff next argues that mere possession at the time of the Sheriff's sale by a tenant will not bar recovery on the bond. It is said that the occupant must have a right to possession. We have shown above that the Sheriff on the day of sale could not sell the right to possession since that resided in the Browns. Whether or not that right had been cut off by the notice to quit is disputed. If the Sheriff had been in a position to sell the right to possession the announcement would have been unnecessary. Plaintiff made the announcement in an attempt to cure its inability to sell the right to possession because of the defect in its foreclosure proceeding.

12. Pages 42-44.

Plaintiff again contends that a writ of assistance would have gone against the Browns on the authority of *Strong v. Smith*, 68 N. J. Eq. 690. We see again the loose application of the words of a Court to a completely different case than that with reference to which the words were spoken. Vice-Chancellor Stevenson's opinion says that a writ of assistance will go against a person not a party to the suit

“1. Where the person in possession has entered *pending the suit* under *any* of the parties.”

It has already been shown that the Browns did not enter pending the suit. Process had not been issued when they took possession. Furthermore, it is submitted that despite the word “any” in the quoted rule, a writ of assistance will not issue

against a tenant who takes under the mortgagee in possession. His possession has not "in some lawful mode" been "subjected to the jurisdiction of the court." Nor is his right of possession "undoubtedly subordinate to the right for the enforcement of which the writ of assistance is prayed".

The *Smith* case was primarily concerned with a tenant who concealed his interest in the mortgaged premises by fraud. Admitting that the Court of Chancery has summary powers which it may exercise in favor of a purchaser at foreclosure sale, against one who was not a party thereto, but whose possessory right is unquestionably inferior, we say that the present case contains no facts which would have warranted the exercise of those powers. Plaintiff knew about the Browns' tenancy when it started its foreclosure. Its negligence, or ignorance, in failing to cut the Browns off, could be no ground for such extraordinary relief.

13. Pages 45-46.

Plaintiff maintains that a rule making tenants who take under the mortgagee in possession, pending the foreclosure suit, bound by the decree is indispensable economically. It complains that insuperable difficulties will otherwise arise in the handling of mortgages on parcels with many tenants. The answer is plain. If the mortgagee desires to hold a responsible party on the bond he can forego the comparatively slight revenue obtainable by the filling of vacancies which occur during the foreclosure. If he desires those revenues, he must waive his action for deficiency. He should not be able to have his cake and eat it. Plaintiff's argument, of course, has no application to the premises here involved. They con-

sist of a two family dwelling. The exigencies of the mortgagee of a large income-producing property cannot alter the applicable rules of law. If the policy of those rules is to be changed the solution is legislation, not the tacking on of judicial modifications.

14. Page 49.

Plaintiff attempts to circumvent the language of the *Lis Pendens* Act with respect to the necessity of persons taking through a defendant in order to become bound by the decree by asserting that a tenant placed in possession by the mortgagee in réality takes through the mortgagor, the mortgagee being only an "intermediary". We submit that this reasoning is entirely fallacious. There is no privity of estate, interest or contract between the mortgagor and a tenant of the mortgagee in possession. The estate of the mortgagee in possession is a fee, subject to be divested only by the exercise of the equity of redemption. He makes a lease in his own right, not in that of the mortgagor. His tenant in no sense claims under the mortgagor.

Conclusion.

It was appellants' view that there were only two narrow issues on this appeal, the propriety of the order striking the rejoinder, and the soundness of the Trial Judge's opinion that that order was dispositive of the case. Appellee has seen fit to reargue many other matters, viz, the *quantum* of the tenancy of the Browns, the necessity of their being joined in the foreclosure, the effect of the notice to quit, etc. Appellants were, of necessity, forced to reply. On the last mentioned issues, we respectfully submit that this

Court has already spoken. If the tenancy of the Browns had not been a sufficient encumbrance to warrant a jury trial there would have been a vastly different result on the previous appeal. On the new questions presented, we respectfully urge that the Trial Judge committed serious error, and that there should be a reversal of his judgment.

Respectfully submitted,

SIMON M. SELEY,
Attorney for and of Counsel with
Defendants-Appellants.

LESTER SANDLES, and
BENJAMIN L. STERN,
On the Brief.

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