REFORM OF MORTGAGE FORECLOSURE PROCEDURE—
POSSIBILITIES SUGGESTED BY *HONEYMAN v.*
JACOBS

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With increasing frequency in recent months, leading New York newspapers have complained of the excessive costs of foreclosure of mortgages in this State. While the writers of those articles were primarily concerned with the evils of this situation as they affect the local real estate market, the fault is by no means confined to New York; the problem is rather one of nationwide concern. This matter attracts particular attention at this time because of the greater difficulties encountered by the Home Owners Loan Corporation and the Federal Housing Administration, in their efforts to assist small home owners, in states where costs of foreclosures are high and the procedure cumbersome, as compared with those where a simple procedure and low costs prevail.

It is obvious that the attractiveness of a secured loan as an investment is vitally affected by the cost and facility of enforcing the security. Naturally, the smaller the sum involved and the smaller the value of the security, the greater is the part played by this consideration in the mind of the potential investor. Consequently, while the cumbersome procedure and excessive costs of foreclosure in New York and certain other states do not deter the flotation of large corporate bond issues, they are a very serious deterrent to the making of small mortgages, thereby causing hardship to potential small home owners.

For example, a resident of New York who wishes to own his own home but needs a loan of two or three thousand dollars for the purpose, will find it much more difficult to obtain it than a resident of Massachusetts or Connecticut would under similar circumstances. The reason for this is that the New York mortgagee knows that, in the event of default, it will cost him approximately five hundred dollars to enforce his security, whereas the Massachusetts or Connecticut mortgagee can do so for less than one hundred dollars. This inability of the potential small home owner to obtain the loan he needs in turn affects adversely both the local real estate market and the local building industry.

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I. THE PROBLEM

Fundamentally, the test of any system of procedure on foreclosure is the extent to which it secures an equitable balance between the conflicting interests of the mortgagor and mortgagee. It must be borne in mind that a mortgage in essence is a transaction by which one party, the mortgagee, makes a loan to the other party, the mortgagor, who as security for his debt confers on the lender the right to obtain payment of his loan out of certain real property owned by the borrower, in the event that the debt is not repaid when due.¹ In giving each party his rightful claim, the law has endeavored to balance their competing interests, affording as many benefits and imposing as few hardships as possible. Whereas economic conditions and the concomitant policy considerations may at one time require that the interests of one party be advanced, and this necessarily to the detriment of the other, similar dictates at another period prompt the court to swing the balance in the opposite direction. Thus it is that the Anglo-American jurisdictions, all cognizant of the true relationship between the parties, are ever seeking, by their varying forms of procedure, to effect such reforms as are likely to attain what might be called an ideal equilibrium between the various competing interests involved. At any rate, the fact of this continuing struggle between the creditor and debtor is a primary consideration well to bear in mind. Any analysis of the relationship between them as crystallized in a mortgage must necessarily and inherently embody a realization of that struggle.

In seeking to devise a system of foreclosure which will be both expeditious and cheap and which will at the same time render substantial equity, it becomes apparent that the greatest obstacle to simplification is the problem of the deficiency judgment. This problem, unknown to the early law of mortgages, is now more beset with complications than any other phase of the subject matter. They arise largely out of misconceptions of the nature of deficiency judgments and a tendency to exalt long continued use of a mere procedural device to the status of a substantive, vested right. The Supreme Court of the United States,²

1. The mortgage was first known to the early English common law as the "mortuum vadium", or "dead pledge", because until redeemed the property was dead to the pledgor. Blackstone defined a "fee in mortgage" as an "estate upon condition". 2 BL. COMM. *157-159. The title to the fee was in the mortgagee, subject to defeasance if the mortgagor paid his debt on the due date. The mortgagee was entitled to occupy the land and enjoy the rents and profits immediately upon execution of the mortgage. 2 KENT COMM. 181 *et seq.* But this right to immediate use of the land never existed in New York. *Jackson v. Willard*, 4 Johns. 41 (N. Y. 1809). However, the more customary course was for the mortgagee to wait until default to enter, as otherwise he would be accountable to the mortgagor for the rents and profits. *Newall v. Wright*, 3 Mass. 138 (1807); *Erskine v. Townsend*, 2 Mass. 493 (1807); *Anonymous*, 1 Vern. 45, 23 Eng. Rep. R. 298 (1682); 2 BL. COMM. *157 *et seq.*; 6 KENT COMM. 181 *et seq.*

2. *Honeyman v. Jacobs*, 306 U. S. 539 (1938).

in a decision whose importance can hardly be exaggerated, has done much to dispel these misconceptions, thereby facilitating the removal of this obstacle to the adoption of a simplified form of foreclosure, which would at the same time render a more desirable result with equal efficacy. This decision also points the way to a re-examination of the problem in the light of its history.

II. FORECLOSURE

Under the early law, when the mortgagor failed to pay his debt on the due date, the mortgagee's title, theretofore subject to defeasance, became absolute, and he was entitled to immediate entry and possession, without the necessity of further legal action.³ He could distrain for rent against a tenant even though the latter had not attorned,⁴ and he could maintain an action of trespass or ejectment against the mortgagor for possession.⁵ On the other hand, if the mortgagor paid his debt on the due date, title reverted to him and he could oust the mortgagee through an action of ejectment.⁶ This was the sole remedy afforded the mortgagor by the common law. Eventually, however, as realization grew that frequently the mortgagee obtained an unconscionable advantage over the mortgagor through the forfeiture of estates worth considerably more than the amount of the debt, equity came to the relief of the mortgagor. In order to withhold from the creditor the pound of flesh he was claiming, the chancellors evolved the theory known as the "equity of redemption",⁷ whereby, even after default, the mortgagor could "redeem" the property by payment of the debt with interest to the date of payment and any expenses which the mortgagee might legitimately have incurred by reason of the default. The next step, necessitated by the fact that the mortgagor's bill to redeem was a continuing threat to the security of titles to land,

3. *Newall v. Wright*, 3 Mass. 138 (1807); *Erskine v. Townsend*, 2 Mass. 493 (1807); *Moss v. Gallimore*, 1 Doug. 279, 99 Eng. Rep. R. 182 (1779); 2 BL. COMM. *157-159; 6 KENT COMM. 181 *et seq.*; 3 TIFFANY, REAL PROPERTY (2d ed. 1920) § 650. In New York, the right to take possession after default without foreclosure was eliminated by statute in 1830. 2 N. Y. REV. STAT. 312, § 57; *Barson v. Mulligan*, 191 N. Y. 306, 84 N. E. 75 (1908); *Trimm v. Marsh*, 54 N. Y. 599 (1874).

4. *Moss v. Gallimore*, 1 Doug. 279, 99 Eng. Rep. R. 182 (1779). See also Note (1931) 80 U. OF PA. L. REV. 269.

5. *Newall v. Wright*, 3 Mass. 138 (1807); *Erskine v. Townsend*, 2 Mass. 493 (1807).

6. 2 BL. COMM. *157 *et seq.* For a modern analysis of this device, see Note (1939) 25 VA. L. REV. 947.

7. 2 BL. COMM. *157 *et seq.*; 6 KENT COMM. 181 *et seq.* For an excellent historical discussion, see *Clark v. Rayburn*, 8 Wall. 318 (U. S. 1868) and *Goodenow v. Ewer*, 16 Cal. 461 (1860). This early "equity of redemption" must be distinguished from the present use of the word to connote the interest in the property which remains in the mortgagor during the existence of the mortgage, i. e., prior to satisfaction or foreclosure. It is interesting to note that in New York it was held that the equity of redemption could not be waived. *Hughes v. Harlam*, 166 N. Y. 427, 60 N. E. 22 (1901).

involved the old proceeding known as "strict foreclosure".⁸ This enabled the mortgagee, at any time after default, to file a bill in chancery requiring the mortgagor to pay the entire debt with interest and costs within a fixed period of time; failure to make such payment rendered the mortgagee's title to the land absolute.⁹

While the practice of strict foreclosure secured to the mortgagee the desired advantages, at the same time, it recreated the former objection concerning the mortgagor, namely, that he still lost his property without regard to the fact that it might be worth considerably more than the amount of his debt. To avoid this situation, equity initiated the practice of requiring a foreclosure sale.¹⁰ At an early date the English Chancellors began ordering such a sale when the mortgagor requested it¹¹ and equitable grounds therefor were shown. In America, New York was among the first jurisdictions to substitute foreclosure and sale for strict foreclosure, this practice being the customary one almost since the Revolution.¹² At that time strict foreclosure prevailed in New England, where it still obtains in Massachusetts,¹³ Connecticut,¹⁴ and Vermont,¹⁵ and in a minority of other jurisdictions.¹⁶ Obviously, however more desirable from the standpoint of public policy than the earlier practice, the procedure of foreclosure and sale involved logical inconsistencies with the established doctrine that the mortgagee under the mortgage took the fee title subject to defeasance. If title became absolute on the breach of the mortgagor's covenant to pay the debt, whence did the court derive its power to decree a sale? Equity did not allow logic to interfere with the new procedure of sale, however, and it gradually became the common method of fore-

8. *Clark v. Rayburn*, 8 Wall. 318 (U. S. 1868); *Goodenow v. Ewer*, 16 Cal. 461 (1860); *Frank v. Davis*, 135 N. Y. 275, 31 N. E. 1100 (1892); *Parker v. Housefield*, 2 Myl. & K. 419, 39 Eng. Rep. R. 1004 (1834); 2 BL. COMM. *157 *et seq.*; 6 KENT COMM. 181 *et seq.*; TIFFANY, *loc. cit. supra* note 3.

9. The period allowed for redemption varied. *Newall v. Wright*, 3 Mass. 138 (1807) (three years); *Gilman v. Hidden*, 5 N. H. 30 (1829) (one year); *Parker v. Housefield*, 2 Myl. & K. 419, 39 Eng. Rep. R. 1004 (1834) (six months). It is now two months in Massachusetts. 2 MASS. GEN. LAWS (1932) c. 244, § 5. Failure to provide for a period of redemption in a decree of strict foreclosure is reversible error, unless specific statutory authority to the contrary exists. *Clark v. Reyburn*, 8 Wall. 318 (U. S. 1868).

10. *Clark v. Reyburn*, 8 Wall. 318 (U. S. 1868); 6 KENT COMM. 181 *et seq.*; 3 TIFFANY, *loc. cit. supra* note 3.

11. Chancellor Eldon in *Monday v. Monday*, 1 V. & B. 223, 35 Eng. Rep. R. 87 (1813).

12. *Lansing v. Goelet*, 9 Cow. 346 (N. Y. 1827); KENT COMM. 181 *et seq.*

13. 2 MASS. GEN. LAWS (1932) c. 244, § 1. On default by the defendant in pleading, or on determination of the issues in plaintiff's favor, the court enters judgment that the defendant pay the mortgage debt with interest and costs within two months or the plaintiff shall have the land, and on the expiration of that period without payment the court awards execution for possession and costs to the plaintiff. *Id.* § 5.

14. 2 CONN. GEN. STAT. (1930) tit. 52, c. 274, § 5090.

15. VT. GEN. LAWS (1917) tit. 12, c. 79, § 1548.

16. See 5 TIFFANY, REAL PROPERTY (3d ed. 1939) § 1518.

closure, later with statutory regulation, throughout the United States.¹⁷ Furthermore, the problem has since become academic, in that the majority of American jurisdictions have abandoned the so-called title theory, for the lien theory.¹⁸

III. DEFICIENCY JUDGMENTS

The deficiency judgment, in its technical meaning, was unknown to the early foreclosure practice.¹⁹ Whereas originally strict foreclosure meant that the mortgagee took the property in full satisfaction of the debt,²⁰ it subsequently became the rule that if the value of the land was insufficient to compensate him in full he might maintain an action at law on the bond for the balance.²¹ In fact, it came to be generally held that the mortgagee could pursue his equitable remedy of foreclosure and his legal remedy of an action on the bond concurrently.²² Such a procedure is obviously preferable, as a matter of procedure, to the separate action at law on the bond for a deficiency, as it obviates the necessity of two distinct actions. There is, however, no authority in common law or equity to do so in the absence of statute or special rule of court.²³ It is a creature of statute now in force in the majority of states.²⁴

17. *Barson v. Mulligan*, 191 N. Y. 306, 84 N. E. 75 (1908); *Hughes v. Harlam*, 166 N. Y. 427, 60 N. E. 22 (1901); *Moulton v. Cornish*, 138 N. Y. 133, 33 N. E. 842 (1893); 5 THOMPSON, REAL PROPERTY (1924) § 4775.

18. 5 THOMPSON, REAL PROPERTY (1924) § 4367. Under this doctrine, the title remains in the mortgagor, and the mortgagee is regarded as possessing only a lien on the property to secure payment of his loan. It would seem that this theory more accurately represents the actual relation of the parties.

19. The mortgagee could sell the equity of redemption upon execution under a judgment in an action at law on the bond, but this practice was disapproved by Chancellor Kent. See *Tice v. Annin*, 2 Johns. Ch. 125, 130 (N. Y. 1816). It was subsequently prohibited by statute. 2 N. Y. REV. STAT. (1829) 368, §§ 31, 32. See *Dela-plaine v. Hitchcock*, 6 Hill 14 (N. Y. 1843).

20. 6 KENT COMM. 182.

21. *Amory v. Fairbanks*, 3 Mass. 562 (1793); *Globe Insurance Co. v. Lansing*, 5 Cow. 380 (N. Y. 1826); *Perry v. Barker*, 13 Ves. 198, 33 Eng. Rep. R. 269 (1806). In case of strict foreclosure, the deficiency was ascertained by estimate and proof of the value of the realty. *Amory v. Fairbanks*, *supra*.

22. *Dunkley v. Van Buren*, 3 Johns. Ch. 330 (N. Y. 1818); *Burnell v. Martin*, 2 Doug. 417, 99 Eng. Rep. R. 268 (1780); *Booth v. Booth*, 2 Atk. 343, 26 Eng. Rep. R. 609 (1742). There was a conflict between the English and American cases as to whether an action at law on the bond after strict foreclosure opened it and allowed the mortgagor to redeem. The American cases held that it did not. *Amory v. Fairbanks*, 3 Mass. 562 (1793); *Globe Insurance Co. v. Lansing*, 5 Cow. 380 (N. Y. 1826).

23. *Orchard v. Hughes*, 1 Wall. 73 (U. S. 1863); *Noonan v. Lee*, 2 Black 599 (U. S. 1862); *Frank v. Davis*, 135 N. Y. 275, 31 N. E. 1100 (1892); *Dunkley v. Van Buren*, 3 Johns. Ch. 330 (N. Y. 1818).

24. N. Y. CIV. PRAC. CODE (Cahill, Supp. 1936) § 1083; D. C. CODE (1929) tit. 25, § 206; *Shepherd v. Pepper*, 133 U. S. 626 (1890); *Dodge v. Freedman's Savings and Trust Co.*, 106 U. S. 445 (1882); *People's Holding Co. v. Bray*, 118 Conn. 568, 173 Atl. 233 (1934); *New York Life Ins. Co. v. Gutttag Corp.*, 265 N. Y. 292, 192 N. E. 481 (1934); 42 C. J. 290. Federal courts are now authorized to grant deficiency judgments under Equity Rule 10. *Jefferson Standard Life Ins. Co. v. Buckman*, 82 F. (2d) 125 (C. C. A. 5th, 1936).

For example, in New York, prior to 1829, the separate action at law was the mortgagee's only remedy if he sought a deficiency.²⁵ In that year the Court of Chancery was authorized to grant a judgment for a deficiency in the foreclosure suit.²⁶ While a mortgagee may still seek his deficiency judgment through a separate action instead of doing it in the foreclosure, he has no absolute right to do so and must obtain the permission of the court for good cause shown.²⁷ Until the enactment of the present "moratorium laws", there was no abridgment in New York of the common law right of the mortgagee to ignore his mortgage, if he preferred, and bring an action at law on the bond for the entire amount.

However, in New Jersey, although the Court of Chancery was formerly authorized by statute to enter a judgment for deficiency in the foreclosure action,²⁸ such authorization was repealed in 1880.²⁹ There can be no action at law on the bond without foreclosing the mortgage,³⁰ and although the *amount* of the deficiency is determined on foreclosure, a deficiency judgment can be obtained only in a separate action at law brought within three months of foreclosure.³¹

In Florida, the courts are authorized by statute to grant a deficiency judgment in a foreclosure action, but it is optional with the plaintiff to seek it there or bring a separate action at law.³²

When the foreclosure sale was substituted for strict foreclosure, it was apparently regarded by the adopting courts, both at the time and for long afterwards, as the final answer to the problem posed by foreclosure of obtaining for the mortgagee the full amount to which he was entitled, but no more, without hardship to the mortgagor. Although it was assumed as an eternal verity that the sale would result

25. *Dunkley v. Van Buren*, 3 Johns. Ch. 330 (N. Y. 1818).

26. N. Y. REV. STAT. (1829) pt. 3, c. 1, tit. 2, art. 6, § 202, which became Section 167 of the Code of Procedure by N. Y. Laws 1863, c. 392, and later became Section 1627 of the Code of Civil Procedure. This statute, originally applicable only to the mortgagor, was expanded to cover any party to the foreclosure who was liable to the plaintiff for the debt. Section 1627 of the Code of Civil Procedure, as amended by N. Y. Laws 1876, cc. 448, 449, N. Y. Laws 1877, cc. 416, 422, and N. Y. Laws 1880, c. 178. This section became Section 1083 of the New York Civil Practice Act.

27. *Scofield v. Doscher*, 72 N. Y. 491 (1878); *Equitable Life Ins. Society v. Stevens*, 63 N. Y. 341 (1875); *Cooper Co. v. Naumburg*, 154 App. Div. 225, 138 N. Y. Supp. 1005 (1912). See N. Y. CIV. PRAC. CODE (Cahill, Supp. 1936) § 1078.

28. *Currie v. Sisson*, 34 N. J. Eq. 578 (1881).

29. N. J. Laws 1880, c. 170, p. 255. From that time on, there could be no deficiency judgment in the foreclosure suit. N. J. REV. STAT. (1937) § 2:65-1. *Hinkle v. Champion*, 42 N. J. Eq. 610, 8 Atl. 656 (1887); *Toffey v. Atcheson*, 42 N. J. Eq. 182, 6 Atl. 885 (1886).

30. N. J. REV. STAT. (1937) § 2:65-2. See *Pruden v. Savage*, 70 N. J. L. 22, 23, 56 Atl. 690 (1904); cf. *Franklin Loan and Bldg Ass'n v. Richman*, 65 N. J. L. 526, 47 Atl. 426 (1900).

31. *Broadman v. Colonial Building-Loan Ass'n*, 118 N. J. Eq. 275, 178 Atl. 775 (1935); *Fruzynski v. Jablonski*, 117 N. J. Eq. 117, 175 Atl. 112 (1934).

32. *Reid v. Miami Studio Properties, Inc.*, 190 So. 505 (Fla. 1939); *Coffrin v. Sayles*, 128 Fla. 622, 175 So. 236 (1937); *Letchworth v. Koon*, 99 Fla. 451, 127 So. 321 (1930).

in an ideal equilibrium in the fundamental conflict between debtor and creditor,³³ the practice, however, proved to be not as happy as the theory. It is common knowledge what happens to judicial sales in times of depression. But even in normal times, the foreclosure sale, especially in populous areas, was no criterion of value. Potential purchasers preferred to deal with the mortgagee from whom they could get the property at a lower price, since he had his deficiency judgment, than they could if they had to bid against him at the foreclosure sale, where it was to his interest to prevent them from getting the property at less than the amount of the mortgage debt.

This system, of foreclosure sale with a deficiency judgment, operated for a long period of time to the detriment of the mortgagor. But absent a statute, there were several devices available to the courts to relieve against this undesirable condition.

1. *Judicial discretion as to confirmation of sales*: In this regard, it is to be noted first, that in the pre-1933 era the prevailing view was that once a sale was confirmed by the court the amount of the successful bid thereat was conclusive in determining the amount of a deficiency.³⁴ The courts would not reduce a deficiency by reason of the fact that subsequent to the rendition of the judgment the mortgagee sold the property for a sum greater than the amount of the mortgage.³⁵ Such relief as the courts afforded was granted in connection with the sale.

But even with this discretionary power,³⁶ it was seldom that the court would exercise it. Thus, although inadequacy of price is an element to be considered, the general rule is that it alone is insufficient.³⁷ Moreover, the fact that an inadequacy so gross as to shock

33. The theory was that provided only that the sale be adequately advertised and fairly conducted, independent bidders would appear and the property would be purchased for its actual value. If such actual value were greater than the amount of the mortgage, the surplus would be paid to the mortgagor, who was thus protected against the sacrifice of his property; if less, the mortgagee was compensated for the inadequacy of his security by a deficiency judgment.

34. *Jacksonville Loan and Ins. Co. v. National Mercantile Realty and Improvement Co.*, 77 Fla. 825, 82 So. 292 (1919).

35. *Ramsden v. Keene Five Cents Savings Bank*, 198 Fed. 807 (C. C. A. 8th, 1912); *Berman v. One Forty-Five Belmont Ave. Corp.*, 109 N. J. Eq. 256, 156 Atl. 830 (1931), *aff'd* 112 N. J. Eq. 171, 163 Atl. 893 (1933). In *Gordon v. Harris*, 290 Mass. 482, 195 N. E. 744 (1935) the court held that immediate resale at double the amount of the bid was no evidence of bad faith. See *de Funiak, Right to Deficiency Judgment Where Mortgagee Purchasing at Foreclosure Sale Has later Resold at a Profit* (1939) 27 Ky. L. J. 410.

36. *Goodell v. Harrington*, 76 N. Y. 547 (1879); *Hale v. Clauson*, 60 N. Y. 339 (1875) (where it was held that no appeal lay from the exercise of this discretion to the Court Appeals). See also 3 JONES, MORTGAGES (8th ed. 1928) § 2105; 5 THOMPSON, REAL PROPERTY (1924) § 4815.

37. *Bovay v. Townsend*, 78 F. (2d) 343 (C. C. A. 8th, 1935); *Orlove v. National Savings & Trust Co.*, 98 F. (2d) 259 (App. D. C. 1938); *Doyle v. Maxwell*, 155 Ark. 477, 244 S. W. 732 (1922); *Wright v. Branch*, 27 Del. 484, 90 Atl. 41 (Super. Ct. 1914); *Stallings v. Annapolis Savings Inst.*, 167 Md. 4, 172 Atl. 283 (1934); *Hacketts-town National Bank v. Smith*, 125 N. J. Eq. 482, 6 A. (2d) 486 (1939); *Fidelity Union*

the conscience of the court is likely to effect intervention by it is of little moment since the degree of inadequacy required is very gross indeed.³⁸ In fact, it has been flatly stated that inadequacy alone is never sufficient grounds to deny confirmation.³⁹ However, under another attitude, where the property goes for an obviously low price, the court is inclined to consider slight additional circumstances as amounting to fraud or mistake, as a justification of their refusal to confirm or their order to vacate the sale.⁴⁰ Further, it has been held that whereas other circumstances are necessary to justify vacating a sale which has already been confirmed, inadequacy alone, on the other hand, will justify the refusal of the court to confirm a sale.⁴¹ And it is likewise significant to note that the Pennsylvania court has recently held that gross inadequacy is sufficient to set aside a sale.⁴²

2. *Power to fix an upset price*: Another long recognized, but seldom invoked, power of a court of equity is to fix a so-called upset price—a minimum sum which must be bid on a foreclosure sale, below which no sale will be confirmed.⁴³ This device is used mostly for the protection of bondholders in foreclosures of large corporate properties.⁴⁴ It has, however, been applied also for the benefit of small mortgagors,⁴⁵ although instances of it are too sparing to have made

Trust Co. v. Pasternack, 123 N. J. Eq. 181, 196 Atl. 469 (1938); Syracuse Trust Co. v. Corey, 167 Misc. 506, 4 N. Y. Supp. (2d) 349 (Sup. Ct. 1938); State Realty & Mortgage Co. v. Villaume, 121 App. Div. 793, 106 N. Y. Supp. 698 (1st Dep't 1907). See also 3 JONES, MORTGAGES (8th ed. 1928) § 2140.

38. This is apparent from a survey of the following cases where the court did intervene: Ballentyne v. Smith, 205 U. S. 285 (1907) (property worth at least seven times the amount of the bid); Moeller v. Miller, 315 Ill. 454, 146 N. E. 449 (1925) (value, \$6,000—bid, \$575); Detroit Trust Co. v. Hart, 274 Mich. 144, 264 N. W. 321 (1936) (value, \$89,000—bid, \$25,000); Michigan Trust Co. v. Cody, 264 Mich. 258, 249 N. W. 844 (1933) (value, \$185,000—bid, \$50,000); Ukrainian Nat. Ass'n v. Linden Supply Co., 124 N. J. Eq. 400, 1 A. (2d) 941 (1938) (value, \$16,820—bid, \$3,000). Here the New Jersey court departed from its rule that any sale would be confirmed where there had been competitive bidding; Purdy v. Wilkins, 95 Misc. 706, 160 N. Y. Supp. 17 (1916) (value, \$24,500—bid, \$1,300); Peoples-Pittsburgh Trust Co. v. Bickie, 330 Pa. 398, 199 Atl. 213 (1938) (value, \$15,000 to \$23,000—bid, \$1,107.95).

39. Connely v. Rue, 148 Ill. 207, 35 N. E. 824 (1893); Carlisle v. Dunlap, 203 Mich. 602, 169 N. W. 936 (1918).

40. Ballentyne v. Smith, 205 U. S. 285 (1907); Straus v. Anderson, 366 Ill. 426, 9 N. E. (2d) 205 (1937); City National Bank & Trust Co. v. O'Keefe, 294 Ill. App. 56, 13 N. E. (2d) 293 (1938); Detroit Trust Co. v. Hart, 274 Mich. 144, 264 N. W. 321 (1936); Michigan Trust Co. v. Cody, 264 Mich. 258, 249 N. W. 844 (1933); Ukrainian National Association v. Linden Supply Co., 124 N. J. Eq. 400, 1 A. (2d) 941 (1938); Crane v. Stiger, 58 N. Y. 625 (1874); Buffalo Savings Bank v. Newton, 23 N. Y. 160 (1861). See Warm, *A Study of Some of the Problems Concerning Foreclosure Sale and Deficiency Judgments* (1936) 6 BROOKLYN L. REV. 167, 176.

41. Straus v. Anderson, 366 Ill. 426, 9 N. E. (2d) 205 (1937).

42. Peoples-Pittsburgh Trust Co. v. Bickie, 330 Pa. 398, 199 Atl. 213 (1938).

43. See Warm, note 40 *supra*, at 191.

44. Manhattan Ry. v. Central Hanover Bank & Trust Co., 99 F. (2d) 789 (C. C. A. 2d, 1938), *cert. denied* 306 U. S. 641 (1939); Central Trust Co. v. Washington County R. R., 124 Fed. 813 (C. C. D. Me. 1903); Clinton Trust Co. v. 142-144 Jerusalem Street Corp., 237 App. Div. 789, 263 N. Y. Supp. 359 (2d Dep't 1933).

45. Bechtel v. Rocke, 288 Ill. App. 229, 5 N. E. (2d) 872 (1937); Farmers' and Mechanics' Savings Bank v. Eagle Bldg. Co., 151 Misc. 249, 271 N. Y. Supp. 306 (Sup. Ct. 1934).

any substantial contribution to the problem of mitigating the hardships of foreclosure sales.

3. *Appraisal statutes*: A form of relief analogous to that of the upset price is the statute requiring appraisal of the mortgaged property before sale on foreclosure to determine, approximately at least, what price the land must bring in order to have the sale confirmed. Ohio has had such a statute from the earliest days of its statehood, and a sale will not be confirmed which brings less than two-thirds of the appraised value.⁴⁶ In Porto Rico, where the parties do not agree on a value of the mortgaged property for sale purposes, the court is authorized by statute to fix such value by appraisal in the foreclosure action.⁴⁷ The most interesting appraisal statute is that of Connecticut,⁴⁸ where strict foreclosure still prevails.⁴⁹ If the plaintiff seeks a deficiency judgment, either he or the defendant may ask the court to appoint three appraisers to fix the value of the property within ten days after the expiration of the redemption period—the “law day”. The valuation so obtained is deducted from the amount due on the mortgage, including taxes and prior encumbrances, and a deficiency judgment is entered for the balance. When the appraisers’ report is submitted to the court, the defendant may file objections, but if the report is accepted and approved it is conclusive.⁵⁰ This procedure is used also where the mortgaged land has been sold in parcels to determine how many parcels the plaintiff is entitled to in order to discharge the debt which is owed him.⁵¹ It is to be noted, further, that the appraisal and entry of deficiency judgments are all accomplished in the foreclosure action.⁵²

46. *Coe v. Columbus, Piqua and Indiana Road Co.*, 10 Ohio St. 372 (1859); *Provident Bldg & Loan Ass'n v. Pekarek*, 52 Ohio App. 492, 3 N. E. (2d) 983 (1936). Likewise Louisiana requires that the sale bring at least two-thirds of the appraised value. *Pan-American Bank & Trust Co. v. Tallulah Cotton Oil Co.*, 151 La. 511, 90 So. 779 (1922). See also 1 OKLA. STAT. (1931) § 451; *Kahn v. Gray*, 182 Okla. 177, 76 P. (2d) 1042 (1938); *Viger v. Exchange Trust Co.*, 156 Okla. 146, 11 P. (2d) 194 (1932).

47. *Porto Rico Rev. Statutes, Codes and Organic Laws* (1913) 1063 *et seq.*; *Henna v. Sauri & Subira*, 237 Fed. 145 (C. C. A. 1st, 1916).

48. 2 CONN. GEN. STAT. (1930) § 5083.

49. See note 14 *supra*.

50. *Wilcox v. Bliss*, 116 Conn. 320, 164 Atl. 659 (1933). If the parties do not move for an appraisal, the court may take testimony, fix the value and enter a deficiency judgment thereon. *Acampora v. Warner*, 91 Conn. 586, 101 Atl. 332 (1917); *Suisman v. Gorentz*, 90 Conn. 618, 98 Atl. 89 (1916); *Windham County Savings Bank v. Himes*, 55 Conn. 433, 12 Atl. 517 (1887).

51. *New England Mortgage Realty Co. v. Rossins*, 121 Conn. 214, 183 Atl. 744 (1936) (where the court sustained this provision as to mortgages executed prior to its passage, against the charge that it was unconstitutional as an impairment of the obligations of contracts under Article I, Section 10, of the Federal Constitution). See p. 968 *infra*.

52. *People's Holding Co. v. Bray*, 118 Conn. 568, 173 Atl. 233 (1934).

IV. LEGISLATION ARISING OUT OF THE DEPRESSION

It was manifest then, that the equity courts required some incentive to move them to intervene. Furthermore, the inequities of the established practice of foreclosure and sale, with a deficiency judgment for the balance, were tremendously enhanced by the nation-wide economic depression which began in 1929.⁵³ Such slight market as previously existed at foreclosure sales rapidly disappeared. The sale became a farce at which mortgagees obtained properties, often of great intrinsic value, for mere nominal bids. As already noted, the inherent equitable powers of the courts were so sparingly exercised that they afforded scant relief. Appraisal statutes, as shown above, existed only in a few isolated instances. In this situation, when in 1932-3 the bottom was dropping out of the real estate market, the legislatures stepped in with statutes, some of limited duration and some permanent, to give aid to distressed mortgagors.

The New York statute⁵⁴ is one of the so-called "mortgage moratorium laws". Its application was limited to mortgages executed prior to July 1, 1932, and although as originally enacted, it was to expire July 1, 1934, it is at present still in force, having been re-enacted each year for ensuing periods of twelve months.⁵⁵ In fact, in 1938, the legislature of that state adopted the policy of its emergency statute as the permanent policy of the state, applicable to the foreclosure of all mortgages.⁵⁶ By its terms, deficiency judgments are limited to the amount by which the total mortgage debt, including principal, interest, taxes, and any other expenses incurred by the mortgagee (such as insurance, and costs of foreclosure) as fixed by the judgment of foreclosure and sale, exceeds the fair market value of the property.⁵⁷ The mortgagee may, as before, bid in the property at a nominal sum but his bid under the statute avails him nothing, because it no longer forms the basis for a deficiency judgment. To obtain a deficiency judgment, the plaintiff must make a motion therefor and the court must thereupon determine, by affidavit or otherwise, the fair market value of the mortgaged realty as of the date of sale, or, if there was no market value at that time, as of the nearest date on which there was a market value.⁵⁸ If the affidavits raise issues of fact, the court

53. See Stanley, *The Effect of Economic Depression Upon Foreclosure* (1939) 27 Ky. L. J. 365.

54. N. Y. CIV. PRAC. CODE (Cahill, Supp. 1936) § 1083a, added by N. Y. Laws 1933, c. 794.

55. N. Y. Laws 1939, c. 607.

56. N. Y. CIV. PRAC. CODE (Cahill, Supp. 1936) § 1083, as amended by N. Y. Laws 1938, c. 540. See p. 971 *infra*.

57. *Clarke v. Schumann*, 269 N. Y. 60, 198 N. E. 666 (1935).

58. N. Y. CIV. PRAC. CODE (Cahill, Supp. 1936) § 1083a, added by N. Y. Laws 1933, v. 794.

will either try the issues by common law proof or appoint a referee to do so.⁵⁹

Statutes with like object but differing in detail have been enacted in many other states during recent years,⁶⁰ commencing with 1933 when the real estate market began to feel the full force of the nationwide economic depression. New Jersey adopted a statute providing that in actions at law on the bond for a deficiency judgment, the court must have the fair market value of the property ascertained and deduct it from the mortgage debt in fixing the judgment.⁶¹ Arkansas first enacted a law in effect abolishing deficiency judgments by requiring the plaintiff in all foreclosures to stipulate that he would bid the amount of the mortgage debt,⁶² but later adopted a less drastic statute which required the court to refuse confirmation of a sale where the price bid was less than the fair market value of the property, or where it found that a better price could be obtained.⁶³ The Georgia statute was similar, providing that no deficiency judgment could be entered except where the sale had been confirmed on a finding that the property sold for its true market value.⁶⁴ In another type of legislation, instead of altering the basis on which deficiency judgments could be obtained, Minnesota merely extended the period allowed for redemption and suspended the bringing of actions for deficiencies until after the expiration of such period.⁶⁵ The California enactment⁶⁶ prohibited deficiency judgments unless notice of breach and election to sell were recorded nine months prior to the sale. Pennsylvania,⁶⁷ Arizona,⁶⁸ and Texas⁶⁹ likewise sought to limit the amount of a deficiency

59. *Central Hanover Bank & Trust Co. v. Eisner*, 276 N. Y. 121, 11 N. E. (2d) 561 (1937); *New York Life Ins. Co. v. H. & J. Gutttag Corp.*, 265 N. Y. 292, 192 N. E. 481 (1934).

60. See Note (1936) 11 TEMP. L. Q. 63.

61. N. J. Laws 1933, c. 82; N. J. Laws 1935, c. 88; N. J. REV. STAT. (1937) v. 1, § 2:65-5.1. The first statute was of unlimited duration and did not by its terms refer to an emergency; the second refers to an emergency and was limited in operation to July 1, 1938. North Carolina's statute is similar to the one in New Jersey, providing that in any action to recover a deficiency after a sale under a mortgage or a deed of trust, the fair value of the property must be offset against the debt. N. C. Laws, c. 275, §§ 1, 2, 3 (permanent legislation).

62. Ark. Laws 1933, No. 57. This statute was of unlimited duration, but referred to the existence of an emergency and applied only to mortgages executed prior to its passage.

63. Ark. Laws 1933, No. 21, § 4, and *id.* 1935, No. 49, § 4. This was permanent, not emergency legislation. See *Miller v. Miller*, 193 Ark. 362, 100 S. W. (2d) 74 (1937), where, under the statute, confirmation of a sale was denied at which \$15,000 was bid for business property which rented for \$420 per month.

64. Ga. Laws 1935, pt. I, tit. VII, No. 412, p. 381 (permanent legislation).

65. MINN. STAT. (Mason, Supp. 1938) §§ 9655-1 to 9666-4.

66. CAL. CODES AND GEN. LAWS (Deering, Supp. 1935) § 376a.

67. PA. STAT. ANN. (Purdon, Supp. 1936) tit. 21, § 806 (an emergency statute of limited duration).

68. ARIZ. REV. CODE (Courtright, Supp. 1936) §§ 2337a-g (permanent legislation).

69. TEX. STAT. ANN. (Vernon, 1938) v. 7, arts. 2218, 2218a (permanent legislation).

judgment to the difference between the amount of the debt plus interest and costs and the fair market value of the property; the first by petition in the foreclosure action, as in New York, and the latter two in the separate action for deficiency, as in New Jersey. Indeed, the Pennsylvania legislature has made three attempts along these lines to help the debtor;⁷⁰ all three have been set aside as invalid.⁷¹

1. *Constitutionality*: As might readily be expected, those statutes were rapidly subjected to attack on constitutional grounds. The constitutional provision relied on in all cases was that clause of the Federal Constitution which prohibits the enactment of state laws which impair the obligations of contracts.⁷² The contention advanced was that while a state may constitutionally alter its remedies for the enforcement of contracts, it may not impair substantive rights by substituting a partial remedy for a complete one; and this was alleged to be the effect of the statutes in question, since the mortgagee under them would get a smaller deficiency judgment than he could have gotten under the law existing when the mortgage was executed. This argument was, of course, submitted only in opposition to the application of the statutes to pre-existing mortgages.

Although the United States Supreme Court has retreated from its original strict position of *Bronson v. Kinsie*⁷³ and *Gantley's Lessee v. Ewing*⁷⁴ and has allowed much wider scope to the police power of the states⁷⁵ in interpreting the obligations of contracts clause, and even though that court upheld the constitutionality of the Minnesota Mortgage Moratorium Laws,⁷⁶ nevertheless, the statutes limiting the amount of deficiency judgments, whether permanent or definitely emergency legislation of limited duration, have not been well received by the state courts. For example, the statutes in both Texas and California, although the latter was an emergency measure of limited duration, were held unconstitutional under the contracts clause on the

70. Pennsylvania Deficiency Judgments Acts of 1934, 1935 and 1937: PA. STAT. ANN. (Purdon, Supp. 1939) tit. 21, § 806 (1934 Act); *id.* §§ 808-820 (1935 Act); *id.* §§ 821, 822 (1937 Act). For a discussion of the 1937 Act, see Legis. (1938) 86 U. OF PA. L. REV. 295.

71. See note 81 *infra*.

72. U. S. CONST. Art. I, § 10. For an analytical discussion of the validity of some of the older statutes, see Feller, *Moratory Legislation: A Comparative Study* (1933) 46 HARV. L. REV. 1061, 1067-1074.

73. 1 How. 311 (U. S. 1843).

74. 3 How. 707 (U. S. 1845).

75. Compare the attitude of the Court in the New York emergency rent cases: *Levy Leasing Co. v. Siegel*, 258 U. S. 242. Also see as to like District of Columbia legislation: *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170 (1921); *Block v. Hirsh*, 256 U. S. 135 (1921).

76. *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398 (1934), 34 COL. L. REV. 361; Note (1934) 47 HARV. L. REV. 660. See note 65 *supra*.

grounds that they diminished the remedy of existing mortgages.⁷⁷ It is pertinent to note, however, that under the prior statute in Texas, the entry of a deficiency judgment for the balance due over the sale price was mandatory, not discretionary, as in New York.⁷⁸ Under a similar statute⁷⁹ the same result was reached in Arizona.⁸⁰ Likewise in Pennsylvania⁸¹ and Georgia⁸² their respective statutes were held unconstitutional as to existing mortgages on the grounds that the common law of those states prior to the statutes in question gave the mortgagee the right to have a deficiency judgment for the entire debt less the sale price, that such right formed a part of the mortgage contract and could not be constitutionally impaired. And the first Arkansas statute,⁸³ which in effect abolished deficiency judgments entirely, was properly held unconstitutional.⁸⁴

Further, the Court of Errors and Appeals of New Jersey held unconstitutional as to pre-existing mortgages its statute of 1933,⁸⁵ providing that in an action at law on the bond for a deficiency the fair value of the property was to be ascertained and deducted from the mortgage debt, as an impairment of the remedy existing at the time of execution of the mortgage.⁸⁶ The decision was predicated also on a provision of the State Constitution prohibiting the impairment of contracts and the deprivation of remedies existing when a contract was made.⁸⁷ Under this more precise provision, it is difficult to see what other result could have been reached. Furthermore, as pointed out by the court, there was not much need for such a

77. *Billups v. Central Life Assurance Society*, 88 S. W. (2d) 735 (Tex. Civ. App. 1935); *Langever v. Miller*, 124 Tex. 80, 76 S. W. 1025 (1934). The California courts felt that the statute diminished the amount of recovery allowed under the remedy provided by law which formed a part of the contract. *Hales v. Snowden*, 19 Cal. App. (2d) 366, 65 P. (2d) 847 (1937); *Brown v. Ferdon*, 5 Cal. (2d) 226, 54 P. (2d) 712 (1936). However in a later case involving a trust deed, the sole remedy for which at the time of execution was a power of sale, the statute was held constitutionally applicable, as it was within the power of the legislature to create the new statutory remedy of foreclosure and subsequently impair it by the later statute. *Miller v. Hart*, 11 Cal. (2d) 739, 81 P. (2d) 923 (1938).

78. *Monaghan v. May*, 242 App. Div. 64, 273 N. Y. Supp. 475 (2d Dep't 1934); *Home Owners Loan Corporation v. Wood*, 164 Misc. 215, 298 N. Y. Supp. 427 (Sup. Ct. 1937).

79. Discussed p. 967 *supra*.

80. *Bontag v. McCurdy*, 48 Ariz. 168, 59 P. (2d) 326 (1936); *Kresos v. White*, 47 Ariz. 175, 54 P. (2d) 800 (1936).

81. *Beaver County Building & Loan Ass'n v. Winowich*, 323 Pa. 483, 187 Atl. 481 (1936), 85 U. of Pa. L. Rev. 114. The 1934 statute was held invalid in *Shallcross v. North Branch-Sedgwick Building & Loan Ass'n*, 123 Pa. Super. 593, 187 Atl. 819 (1936), (1937) 85 U. of Pa. L. Rev. 321. The 1937 statute was ruled out in *Pennsylvania Co. v. Scott*, 329 Pa. 534, 198 Atl. 115 (1938), 86 U. of Pa. L. Rev. 901.

82. *Atlantic Loan Co. v. Peterson*, 181 Ga. 266, 182 S. E. 15 (1935).

83. See p. 967 *supra*.

84. *Adams v. Spillyards*, 187 Ark. 641, 61 S. W. (2d) 686 (1933).

85. See p. 967 *supra*.

86. *Vanderbilt v. Brunton Piano Co.*, 111 N. J. L. 596, 169 Atl. 177 (1933). Accord: *American Homes Building & Loan Ass'n v. Angelillis*, 11 N. J. Misc. 952, 169 Atl. 817 (Sup. Ct. 1933).

87. N. J. CONST. Art. IV, § 7, ¶ 3.

statute because of the ample protection provided for the mortgagor under the doctrine of *Federal Title & Mortgage Guaranty Co. v. Lowenstein*,⁸⁸ against unconscionably low bids. The subsequent statute of 1935, which differed only in that it was a temporary emergency law, was likewise ruled invalid for the same reason.⁸⁹ That this is an attitude firmly entrenched in New Jersey is illustrated by the case of *Alert Bldg. and Loan Ass'n v. Bechtold*,⁹⁰ where in spite of a decision of the Supreme Court of the United States upholding the North Carolina statute⁹¹ against attack under the contract clause of the Federal Constitution, the New Jersey court nevertheless invalidated its own enactment, ruling the State Constitution not affected by the federal decision.

The latter case, *Richmond Mortgage and Loan Corp. v. Wachovia Bank and Trust Co.*,⁹² was by far the most profound approach to the constitutional problem which had been made up to that time. In answering the contention that substantive contract right was impaired because the new statutory remedy did not allow as large a recovery as was usually obtained through the remedy existing when the contract was made, the Supreme Court looked beyond that point to examine the contract relation itself and what the parties were entitled to thereunder. It found that the lender was entitled to recover the money he loaned, with interest, either in cash or property of equivalent value, and he could not complain if the state substituted a remedy which gave him just that.⁹³ The fact that under a prior procedure, he might have gotten more than what was due him was unavailing; the substitution of a more equitable remedy did not impair the obligation of a contract within the meaning of the Federal Constitution. Mr. Justice Roberts, writing the opinion of the Court, stated:

"The loan rendered the appellees debtors to the appellant. For that debt the borrower pledged real estate as security. The contract contemplated that the lender should make itself whole, if necessary, out of the security, but not that it should be enriched

88. 113 N. J. Eq. 200, 166 Atl. 538 (Ch. 1933). See p. 974 *infra*.

89. *Alert Building & Loan Ass'n v. Bechtold*, 120 N. J. L. 397, 199 Atl. 734 (1938); *Fidelity Union Trust Co. v. Bryant*, 14 N. J. Misc. 243, 183 Atl. 825 (Sup. Ct. 1936); *Sayre v. Duffy*, 13 N. J. Misc. 458, 179 Atl. 459 (Sup. Ct. 1935).

90. 120 N. J. L. 397, 199 Atl. 734 (1938).

91. *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 300 U. S. 124 (1937), 85 U. of Pa. L. Rev. 533, 35 MICH. L. REV. 1003.

92. *Ibid*.

93. The North Carolina statute involved required the fair value of the property to be offset against the total debt in an action for a deficiency after a foreclosure sale or a trustee's sale under a power contained in a deed of trust. The sections relative to mortgages has been previously upheld in *Woltz v. Asheville Safe Deposit Co.*, 206 N. C. 239, 173 S. E. 587 (1934). The *Wachovia* case concerned the section relative to deeds of trust.

at the expense of the borrower or realize more than would repay the loan with interest." ⁹⁴

The New York emergency statutes ⁹⁵ limiting deficiency judgments were also sustained as constitutional, against the claim of impairment of the obligations of contracts, but solely on the theory that they were emergency legislation. ⁹⁶ The court's rationale was that by reason of the emergency the statutes were valid as an exercise of the police power of the state under the doctrine of the United States Supreme Court in the "Rent Cases" ⁹⁷ and in *Home Bldg. & Loan Ass'n v. Blaisdell*. ⁹⁸ The statute of 1938, ⁹⁹ by which the Legislature adopted the emergency procedure of obtaining deficiency judgments as the permanent public policy of the state applicable to the foreclosure of all mortgages, has not yet been passed on by the court of appeals. There are, however, two state supreme court decisions, which, unfortunately, are conflicting. Whereas one case declared that the pertinent section of the Act was unconstitutional as to mortgages executed subsequent to July 1, 1932, but prior to the effective date of the amending statute, ¹⁰⁰ a later and quite recent holding sustained the statute upon the ground that the remedy was under the control of the Legislature. ¹⁰¹

2. *Effect of the Statutes on the Courts:* Despite this failure of the emergency statutes to withstand tests of constitutionality, they did perform the very beneficial function of awakening the equity courts to a realization of their inherent powers, ¹⁰² which though long dormant, have always been in their possession, and which, had they been properly exercised before, would have obviated the necessity of legislative intervention. ¹⁰³

The leading case in New York illustrating this new trend is *Monaghan v. May*. ¹⁰⁴ The lower court erroneously held the emergency law ¹⁰⁵ applicable to a foreclosure instituted before its passage. The

94. *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 300 U. S. 124, 129 (1937).

95. N. Y. CIV. PRAC. CODE (Cahill, Supp. 1936) §§ 1083a, 1083b.

96. *Honeyman v. Hanan*, 275 N. Y. 382, 9 N. E. (2d) 970 (1937), *appeal dismissed*, 302 U. S. 375; *Klinke v. Samuels*, 264 N. Y. 144, 190 N. E. 324 (1934).

97. See note 75 *supra*.

98. 290 U. S. 398 (1934).

99. N. Y. Laws 1938, c. 510, *amending* § 1083 of the Civil Practice Act. See p. 966 *supra*.

100. *Home Owners' Loan Corp. v. Margolis*, 168 Misc. 945, 6 N. Y. S. (2d) 432 (Sup. Ct. 1938).

101. *Otselic Valley Nat. Bank v. Dapson*, 170 Misc. 514, 10 N. Y. S. (2d) 588 (Sup. Ct. 1939).

102. See note 36 *supra*.

103. See p. 964 *supra*.

104. 242 App. Div. 64, 273 N. Y. Supp. 475 (2d Dep't 1934).

105. N. Y. CIV. PRAC. CODE (Cahill, supp. 1936) § 1083a.

Appellate Division, while holding the statute inapplicable, did not reverse the judgment below, which had denied a deficiency judgment after a finding under the statutory procedure that the fair market value of the property exceeded the debt. It held rather that a court of equity had inherent power to grant or deny confirmation of the sale, and this included the lesser power to confirm on condition that the fair market value, rather than the price bid, be adopted as the basis for a deficiency judgment. Mr. Justice Carswell, writing the opinion of the court, said:

"When the Legislature spoke, mortgagors and mortgagees learned, earlier than they would have if left to the results of invoking judicial power, that continued abnormal economic conditions would not be permitted to unjustly oppress the borrower. But the judicial power to effect the same results has always been and still is there, responsive to a proper case for its exercise—apart from the statutory declarations.¹⁰⁶

"The court having the power to refuse to confirm the report of sale because the price was inadequate, it likewise had the kindred power to refuse to authorize the entry of a deficiency judgment based on such a sale and computed on such an inadequate or nominal price base."¹⁰⁷

The court further pointed out that the old section of the Civil Practice Act relating to deficiency judgments was not mandatory,¹⁰⁸ as had apparently been assumed from the long continued practice of automatically granting a judgment for the difference between the amount bid and the amount of the debt, but was rather discretionary.

The doctrine of this case has been approved and applied in many other New York cases.¹⁰⁹ For instance, in *Dry Dock Savings Institution v. Harriman Realty Corp.*,¹¹⁰ the court held that in an action to foreclose a mortgage not covered by the emergency laws, it had the power to order the fair value to be ascertained, in order to determine the amount of a deficiency judgment.¹¹¹ It is interesting to note

106. *Monaghan v. May*, 242 App. Div. 64, 65, 66, 273 N. Y. Supp. 475, 478 (2d Dep't 1934).

107. *Id.* at 67, 273 N. Y. Supp. at 480.

108. Former Civil Practice Act § 1083: ". . . the final judgment *may* award payment by him of the residue of the debt . . ." (italics supplied).

109. See notes 110-112 *infra*.

110. 150 Misc. 860, 270 N. Y. Supp. 428 (Sup. Ct. 1934), *aff'd*, 244 App. Div. 793, 280 N. Y. Supp. 981 (1st Dep't 1935). In *Chemical Bank & Trust Co. v. Schumann Associates*, 150 Misc. 221, 268 N. Y. Supp. 674 (Sup. Ct. 1934), the plaintiff in February, 1933, foreclosed a \$9000 mortgage on property which had sold in 1931 for \$17,600. At the foreclosure sale he bid in the property at \$500, and obtained a deficiency for the balance. Later he sold the property for \$12,000. Although Section 1083a was inapplicable because the action was instituted prior to its enactment, the court on defendant's motion vacated the deficiency judgment, holding that its inherent equitable power to vacate the sale included the lesser power to deny or vacate a deficiency judgment.

111. *Dry Dock Savings Institution v. Harriman Realty Corp.*, 150 Misc. 860, 861, 270 N. Y. Supp. 428, 430 (Sup. Ct. 1934). See also *Vogel v. Edwards*, 249 App. Div.

further, that in another case, the court adopted as a formal rule of court, the application of the method prescribed in Section 1083a of the Civil Practice Act for the determination of the amount of deficiency judgments in the foreclosure of all mortgages, whether executed before or after July 1, 1932.

"We hold that there is vested in equity the right to prevent injustice, and that the exercise of its power does not require the fiat of the Legislature. We hold that equity is not impotent, but that its power should be exercised, and such powers are not here limited. We hold that this court has the power to determine the manner and the time when the determination as to a liability for deficiency shall be made, and that it necessarily follows that it has the right to determine the methods and procedure by which the liability for deficiency shall be fixed . . . We hold the granting of a deficiency judgment is not mandatory under section 1083 of the Civil Practice Act."¹¹²

Unfortunately, this doctrine was rejected and the decision in *Monaghan v. May*¹¹³ expressly disapproved by the Court of Appeals in *Emigrant Industrial Savings Bank v. Van Bokkelen*.¹¹⁴ That court held that prior to the enactment of Section 1083a of the Civil Practice Act, and subsequently as to all mortgages not affected by it, a judgment of foreclosure and sale, unless the sale was set aside, fixed the right to a deficiency judgment in the amount by which the mortgage debt plus interest and costs exceeded the amount bid at the sale, pursuant to Section 1083 of the Civil Practice Act.¹¹⁵ That this is "bad law" in addition to being an unfortunate result, is indicated by subsequent decisions.¹¹⁶

However, the rule of the inherent power of equity has found approval in other jurisdictions.¹¹⁷ In *Suring State Bank v. Giese*,¹¹⁸ a mortgage for \$2000 was foreclosed. The property was bid in by the plaintiff for \$600. The court below found the fair value of the property to be over \$2000 and denied a deficiency judgment. The Supreme Court of Wisconsin, in affirming the decision, held that the

742, 291 N. Y. Supp. 683 (2d Dep't 1936); *Guaranteed Title and Mortgage Co. v. Scheffres*, 247 App. Div. 294, 285 N. Y. Supp. 464 (2d Dep't 1936); *Kurtz v. Ferrante*, 243 App. Div. 739, 277 N. Y. Supp. 542 (2d Dep't 1935).

112. *Home Owners' Loan Corp. v. Wood*, 164 Misc. 215, 219, 298 N. Y. Supp. 427, 432 (Sup. Ct. 1937), (1938) 51 HARV. L. REV. 749.

113. See p. 971 *supra*.

114. 269 N. Y. 110, 199 N. E. 23 (1935).

115. Accord, *Guaranteed Title & Mortgage Co. v. Scheffres*, 275 N. Y. 30, 9 N. E. (2d) 764 (1937), *reversing*, 247 App. Div. 294, 285 N. Y. Supp. 464 (2d Dep't 1936); *Chase v. Harvey*, 253 App. Div. 15, 1 N. Y. S. (2d) 541 (3d Dep't 1937).

116. See p. 977 *infra*.

117. See Note (1935) 84 U. OF PA. L. REV. 223.

118. 210 Wis. 489, 246 N. W. 556 (1933); accord, *First National Bank v. Bush*, 287 Ill. App. 632, 5 N. E. (2d) 605 (1936).

inherent equity powers of the court enabled it either to deny confirmation of the sale and order a resale, with or without fixing an upset price, or to confirm the sale on condition that the plaintiff credit against it the fair value of the property. The court also held that the mortgagee should be allowed to choose whether to accept the property at the fair value or have a resale with an upset price.

An excellent case, which probably best illustrates the beneficent exercise of the innate powers of a court of equity, is *Federal Title & Mortgage Guaranty Co. v. Lowenstein*,¹¹⁹ decided by the New Jersey Court of Chancery in 1933. On foreclosure of a mortgage on property worth \$27,500, the plaintiff bid it in for \$100. In presenting objections to the confirmation of the sale, counsel for the defendant showed by affidavit that on the same day about thirty other properties in the same locality, ranging in value from \$5,000 to \$41,000, had been sold on judicial sales and were all bid in for \$100, illustrating that irrespective of the intrinsic worth, or "fair market" value of the properties, there was no actual market by reason of the lack of purchasers. Vice-Chancellor Berry refused confirmation unless the plaintiff would stipulate to accept \$27,500 as the value of the property for the purpose of fixing the amount of deficiency judgment which he might seek to obtain subsequently in an action at law. The Vice-Chancellor reviewed the history of the subject and found that a court of equity had ample power to prevent such injustice through its power to refuse confirmation of the sale.¹²⁰ The Court pointed out that under the circumstances of that case, although the device of a sale was used, the situation was in reality more analogous to a strict foreclosure.¹²¹

The rule of this decision has been somewhat limited by subsequent cases which have held that in order to have the benefit of its application any defendant must establish that the following factors are each present in his case: (1) that the successful bid was uncon-

119. 113 N. J. Eq. 200, 166 Atl. 538 (Ch. 1933).

120. Accord: *Better Plan Bldg. & Loan Ass'n v. Holden*, 114 N. J. Eq. 537, 169 Atl. 289 (Ch. 1933).

121. Vice-Chancellor Berry said: "A sale which the court may, by virtue of its inherent power, direct, it may also, by virtue of the same power, refuse to approve and confirm. The present sale being in effect a strict foreclosure, the ancient practice of appraising the property for the purpose of fixing the deficiency, originally adopted for the protection of the mortgagee, should now be invoked for the protection of the mortgagor. 'Equality is equity.' It would be unjust to permit the mortgagee to extort double satisfaction from the mortgagor, and it would be equally unjust to compel the mortgagee to accept inadequate security in satisfaction of his debt. But it is considered no injustice to the mortgagee, when a judicial sale of mortgaged premises accomplished no more than a strict foreclosure, to revert to the English practice referred to and require the mortgagee to accept that security at its fair value and give him the right to proceed on the bond for the deficiency. In this manner both parties are protected and exact justice is accomplished." *Federal Title & Mortgage Guaranty Co. v. Lowenstein*, 113 N. J. Eq. 200, 208, 166 Atl. 538, 542 (Ch. 1933).

scionably low or, that there was no competitive bidding; (2) that an emergency existed whereby he was unable to obtain refinancing; (3) that his own financial status was such that he could not protect himself at the sale.¹²²

The last requirement, by reason of the fact that it considers the financial status of the mortgagor in each case, appears more desirable than the necessarily more general provisions of any statutory limitation of deficiency judgments, since it prevents an affluent mortgagor from merely unloading such property he does not want on a possibly indigent mortgagee. But it is refreshing to note that the principles of the *Lowenstein* case, as limited, have been approved and applied by the New Jersey Court of Errors and Appeals.¹²³

It is interesting to note also that the Pennsylvania courts after invalidating the state deficiency judgment statutes,¹²⁴ have brought about the same result intended by the legislation, in holding that the foreclosure sale must not prove wholly inadequate.¹²⁵

V. THE DECISION IN *HONEYMAN v. JACOBS* ¹²⁶

It was in this state of the law that the constitutionality of section 1083a of the Civil Practice Act, imposing the emergency restrictions on deficiency judgments in New York, was upheld by the Supreme Court of the United States. In *Honeyman v. Jacobs*, decided in April, 1939, a decision which may well be regarded as a landmark in the law of mortgages, the plaintiff foreclosed a mortgage of \$15,000 and bid in the property for \$7,500. The mortgage had been made in 1928 and was therefore subject to the emergency section of the Civil Practice Act. On the statutory proceedings for deficiency, the trial court found the property to be worth \$25,000 and denied a deficiency judgment. Plaintiff appealed on constitutional grounds, contending that the requirement of deducting the fair value instead of the bid price from the mortgage debt was an impairment of the obligations of contracts in violation of the Federal Constitution. After affirmation by the Court of Appeals,¹²⁷ a further appeal was taken to the United States Supreme Court. That Court, in an opinion by Chief Justice Hughes, held Section 1083a constitutional. The most important aspect of the decision is that the statute was not upheld on grounds of the emergency; that feature was not even mentioned by the Court. Its validity was based rather on the broadest possible grounds—the

122. *Young v. Weber*, 117 N. J. Eq. 242, 175 Atl. 273 (Ch. 1934); *Maher v. Usbe Bldg & Loan Ass'n*, 116 N. J. Eq. 475, 174 Atl. 159 (Ch. 1934).

123. *Fidelity Union Trust Co. v. Dreyfuss*, 121 N. J. Eq. 281, 189 Atl. 631 (1937); *National Mortgage Corp. v. Deering*, 121 N. J. Eq. 274, 189 Atl. 64 (1937).

124. See note 81 *supra*.

125. See note 42 *supra*.

126. 306 U. S. 539 (1939).

127. 278 N. Y. 467, 17 N. E. (2d) 131 (1938).

inherent powers of equity. The Court held that courts of equity have inherent power to control foreclosure proceedings in the interest of fairness—to fix terms of sale, to refuse to confirm a sale which was unfairly conducted or at which an inadequate price was obtained—which powers included the lesser one of controlling the amount of deficiency judgments. The statute is merely declaratory of those powers.¹²⁸ The court, cognizant of the true relationship between the parties, pointed out that the mortgagee was entitled to recover his money, with interest, and no more, and if the practice which prevailed before the statute enabled him to obtain more than was his due, such excessive recovery was not a vested right beyond the power of the legislature to infringe.

“The question is whether in the instant case the denial of a deficiency judgment substantially impaired appellant’s contract right. The bond provided for the payment to him of \$15,000 with the stipulated interest. The mortgage was executed to secure payment of that indebtedness. The contract contemplated that the mortgagee should make himself whole, if necessary, out of the security but not that he should be enriched at the expense of the debtor or realize more than what would repay the debt with the costs and expenses of the suit. Having a total debt of \$15,771.17, with expenses, etc., of \$1,319.03, appellant has obtained through his foreclosure suit the property of the debtor found without question to be worth over \$25,000. He has that in hand. We know of no principle which entitles him to receive anything more. Assuming that the statute before its amendment permitted a recovery of an additional amount through a so-called deficiency judgment, we cannot say that there was any constitutional sanction for such a provision which precluded the legislature from changing it so as to confine the creditor to securing the satisfaction of his entire debt.”¹²⁹

Although this decision involved emergency legislation, the principles enunciated by the Supreme Court equally sustain a permanent statute of like terms. This follows from the fact that the court expressly followed the *Wachovia Bank* case¹³⁰ where permanent legislation was in issue. In closing his opinion, following a discussion of the *Wachovia Bank* case, the Chief Justice said:

128. “Section 1083a in substance assured to the court the exercise of its appropriate equitable powers. By the normal exercise of these powers, a court of equity in a foreclosure suit would have full authority to fix the terms and time of the foreclosure sale and to refuse to confirm sales upon equitable grounds where they were found to be unfair or the price bid was inadequate. . . . In this control over the foreclosure sale under its decree, the court could consider and determine the value of the property sold to the mortgagee and what the mortgagee would thus realize upon the mortgage debt if the sale were confirmed.” *Honeyman v. Jacobs*, 306 U. S. 539, 543 (1939).

129. *Id.* at 542-543.

130. 300 U. S. 124 (1937).

"We reach a similar result here upon the same ground—that under the finding of the state court the mortgagee has obtained satisfaction of his debt and that the denial by the statute of a further recovery does not violate the constitutional provision."¹³¹

The Court also cited with approval the decisions of the Appellate Division of New York in *Monaghan v. May*,¹³² and *Guaranty Title & Mortgage Co. v. Scheffres*,¹³³ of which the former had been disapproved¹³⁴ and the latter reversed¹³⁵ by the court of appeals.

It is submitted that the decision of the Supreme Court of the United States in *Honeyman v. Jacobs* conclusively establishes the constitutionality of Section 1083 of the Civil Practice Act as amended in 1938.¹³⁶ Although that statute has not yet been passed on by the court of appeals, the New York Supreme Court upheld its constitutionality on the authority of the *Honeyman* case.¹³⁷ Furthermore, in 1939, while the majority of the court was holding the new Section 1083 applicable to a mortgage executed prior to its enactment but not covered by Section 1083a, a concurring opinion sustained its constitutionality on the basis of *Honeyman v. Jacobs*.¹³⁸

VI. A PROPOSAL FOR A SIMPLIFIED FORM OF FORECLOSURE

The foregoing lengthy analysis of the historical development of mortgage foreclosures, the evolution of the modern practice of sales and deficiency judgments, the injustices which have arisen in the operation of the same, the efforts made to remedy them and the problems arising thereunder has been made for the purpose of ascertaining what elements of that practice are essential in producing a more equitable balance of the conflicting interests involved, and must therefore be preserved, and what elements, regardless of their origin, have become mere form, to be discarded in the interests of an improved procedure. It is submitted that the study which has been made justifies the following conclusions:

1. The foreclosure sale evolved as a device to protect the mortgagor from the loss of property worth more than the debt which he

131. *Honeyman v. Jacobs*, 306 U. S. 539, 545 (1939).

132. 242 App. Div. 64, 273 N. Y. Supp. 475 (2d Dep't 1934). See p. 971 *supra*.

133. 247 App. Div. 294, 285 N. Y. Supp. 464 (2d Dep't 1936).

134. *Emigrant Industrial Savings Bank v. Van Bokkelen*, 269 N. Y. 110, 199 N. E. 23 (1935).

135. *Guaranteed Title & Mtge. Co. v. Scheffres*, 275 N. Y. 30, 9 N. E. (2d) 764 (1937).

136. N. Y. Laws 1938, c. 510.

137. *Tompkins County Trust Co. v. Herrick*, 171 Misc. 929, 13 N. Y. S. (2d) 825 (Sup. Ct. 1939).

138. *National City Bank v. Gelfert*, 257 App. Div. 465, 468, 13 N. Y. S. (2d) 600, 603 (2d Dep't 1939).

is unable to pay, but, so far from achieving that purpose, it has on the contrary operated to take his property from him and in addition, impose upon him a money judgment for substantially the amount of the debt for which he has already lost his property.

2. The foreclosure sale is generally a useless formality which does not benefit the mortgagor; it causes the mortgagee unnecessary expenses, which, in turn, harm the mortgagor by increasing the costs of the action for which he is liable; and, in the interest of both parties it might better be dispensed with except under particular circumstances to be discussed below.

3. A deficiency judgment, based on the difference between the sales price and the total mortgage debt plus costs, does not operate fairly in that it frequently awards an unjust enrichment to the mortgagee.

4. The conception that the mortgagee has a vested right to a deficiency judgment for which the base is the bid at a foreclosure sale is false and has been dispelled by the decision of the Supreme Court of the United States in *Honeyman v. Jacobs*.

5. A deficiency judgment based on the difference between the fair market value of the property, ascertained by appraisal or other competent means under the direction of the court, and the mortgage debt plus interest and costs, is constitutional as the permanent public policy of any state, in accord with the fundamental principles of equity, and beneficial to both mortgagor and mortgagee, as it protects the former against what may amount to double liability and affords the latter the full amount to which he is equitably entitled.

These conclusions would seem to point to a partial return to the ancient practice of strict foreclosure, which still obtains in certain New England states.¹³⁹ With certain modifications, it is believed that under such a procedure, the courts will be better equipped to serve the interests of both parties, and at much lower cost.

Three distinct situations should be borne in mind and separately provided for.

(a) *Where the mortgagee does not ask for a deficiency judgment:* The procedure of strict foreclosure should be followed here. After the time to plead has expired as to all defendants, and they have defaulted in pleading, the plaintiff should be permitted to enter final judgment, as in other actions where the defendants default. This judgment should give him execution for possession of the property, and forever bar and foreclose the defendants from any title, right,

139. See p. 960 *supra*.

interest or lien thereon. In this situation, the foreclosure sale is a meaningless farce and an entirely unnecessary expense. This procedure could be followed also where the defendant, instead of defaulting, defends on the merits, and the trial results in a determination in favor of plaintiff. If, of course, the defendant sustains his defense, then the usual judgment in favor of defendant against plaintiff for costs would be appropriate. In regard to costs in plaintiff's favor, it would appear equitable to award them, in addition to judgment for possession of the property, only against a defendant who had defended unsuccessfully, and not against one in default.

(b) *Where the mortgagee seeks a deficiency judgment:* In this situation, the statute should require either appraisal or the fixing of the value by the court in the manner at present provided in New York by Sections 1083 and 1083a of the Civil Practice Act. On defendant's default in pleading or failure to sustain an alleged defense, plaintiff should be required to make a motion on notice, as presently required in New York, for the determination of the fair market value of the property. Even if in default in pleading, the defendant sought to be charged should be permitted, as he is in New York today, to offer evidence as to value and to litigate the question. If a deficiency is found to exist in accordance with this procedure, the judgment should award the plaintiff execution for possession of the property and for the recovery in money of the balance so ascertained to be owing. If the plaintiff fails to establish a right to a deficiency judgment, the cost of this proceeding should be borne by him.

(c) *Where a defendant believes the property to be worth more than the amount of the mortgage debt:* In this situation, where a foreclosure sale is manifestly to the defendant's benefit, he should be permitted to demand one. This could be done on notice to the plaintiff by filing a formal demand with the court at any time before entry of judgment. If the price obtained at the sale is insufficient to pay the total mortgage debt and the expenses of sale, the latter should be borne by the demanding party. This right to require a sale should be available to any defendant against whom a deficiency judgment may be sought, and to the owner of the equity of redemption, regardless of whether a deficiency judgment is sought against the latter or not.

A possible logical difficulty in a return to strict foreclosure might be said to exist in the lien theory states, since under the present procedure the mortgagee who has foreclosed acquires his title through deed from the referee appointed by the court to conduct the sale. This difficulty, however, is inconsequential, in that it is a matter of pure

theory. It has already been shown that no practical difference results from the adoption of either theory, and, in fact, that many states where the foreclosure sale prevails have yet adhered to the title theory.¹⁴⁰ Conversely, a lien theory state could as a practical matter just as readily adopt strict foreclosure. Some states, for the sake of logical consistency, might prefer to return to the title theory upon adopting strict foreclosure. Others might prefer to preserve the lien theory but provide by statute that a judgment of foreclosure shall operate to transfer title to the plaintiff in whose favor it is rendered.

The form of procedure outlined has in addition the advantage of simplicity and low cost without sacrifice of the rights of either party. The defendant would not be denied any possible benefit which a sale might afford him, as he might demand and obtain one if he wanted it. And, on the other hand, if the plaintiff sought a deficiency judgment, the defendant would be protected against double liability in the same manner in which the present New York procedure protects him.

A large number of foreclosures are those in which the defendants default and the plaintiff does not seek a deficiency judgment. In these cases, the law should afford the plaintiff a cheap and expeditious remedy. This he would have under the procedure outlined here.

At the very outset, reference was made to the high costs of foreclosure in New York and many other states under existing procedure. These excessive expenses all arise in connection with the sale which, it is submitted, is a useless farce anyway. They are composed of referee's fees, auctioneer's fees, the charge for the use of an auction room, and, specially, the cost of advertising. This last item is particularly absurd, as the advertisements are generally read by no one not competent to ascertain the information from the court records. These expenses, excluding attorney's fees, run anywhere from \$350 to \$500 in New York, and may be still higher where special complications arise.

The proposed procedure of strict foreclosure, except in the special situation referred to above, eliminates the sale entirely and with it, the concomitant expenditures—referees' and auctioneers' fees, rent of auction rooms, and advertisement. The cost of a simple foreclosure would then consist merely of attorneys' fees, the title search, a few dollars for filing the *lis pendens*, complaint and judgment, and, of course, the process-server's charges.

140. See p. 960 *supra*.

VII. CONCLUSION

It is submitted that this simplification of procedure and reduction of costs would be of inestimable benefit, not only to mortgagees, but to mortgagors and home owners as well, and to the real estate market generally, for the following reasons:

1. The person of modest means who wishes to own his home will be able to obtain the loan he needs more easily and on better terms since the lender now knows that, if necessary, he can foreclose without exorbitant expense.

2. Where taxes are in arrears, the mortgagee is apt to be more patient if he is not faced with a costly proceeding, in addition to the back taxes which he must pay, in order to take title.

3. By reducing the cost of enforcing the security, mortgages on real estate will become a more attractive investment, and the value of real estate will rise.

4. The impetus to home building resulting from the greater availability of loans for the purpose will raise the real estate market out of its present sorry state and will also cause a revival in the building industry.