LANDLORD AND TENANT—MORTGAGES—NEW JERSEY'S ANTI-EVICTION ACT, N.J. STAT. ANN. §§ 2A:18-61.1 TO -61.12 (WEST CUM. SUPP. 1980-1981), PROHIBITS REMOVAL OF RESIDENTIAL TENANTS BY FORECLOSING MORTGAGEE UPON DEFAULT OF LANDLORD-MORTGAGOR, ABSENT "GOOD CAUSE"—*Guttenberg Savings & Loan Association v. Rivera*, 171 N.J. Super. 418, 409 A.2d 816 (App. Div. 1979), *certif. granted*, 84 N.J. 417, 420 A.2d 331 (1980).

In *Guttenberg Savings & Loan Association v. Rivera*,[1] the bank held a mortgage on an eight-unit apartment building in Jersey City. After the mortgagor defaulted on payment, the bank filed a complaint in foreclosure seeking to preclude redemption and to obtain a judgment of possession against the tenants.[2] The tenants[3] moved to dismiss the complaint against them,[4] contending that New Jersey's Anti-Eviction Act[5] barred a judgment of possession against residential tenants absent a showing of statutory "good cause." The savings and loan association responded that the Act did not apply because no landlord-tenant relationship existed between the mortgagee and the mortgagor's tenants "since there ha[d] been no attornment by the tenants to plaintiff."[6]

On January 9, 1979, Judge Kentz of the chancery division denied the tenants' motion to dismiss.[7] In a brief, written opinion the trial judge refused to allow the use of the Anti-Eviction Act in any proceeding except a summary dispossess action.[8] The tenants appealed

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[1] 165 N.J. Super. 201, 397 A.2d 1127 (Ch. Div.), *rev'd*, 171 N.J. Super. 418, 409 A.2d 816 (App. Div. 1979), *certif. granted*, 84 N.J. 417, 420 A.2d 331 (1980).

[2] 171 N.J. Super. at 419, 409 A.2d at 817. The debt owed by the mortgagor was approximately $30,000.00. This was a first mortgage on the apartment house, which was located at 510 Palisade Avenue. *Id.*

[3] There were five tenants named in the action: Norma Rivera, Olga Mujer, Goen Rodriguez, Elizabeth Kalisak, and Richard Dressler, all of whom were month-to-month tenants. 165 N.J. Super. at 201, 397 A.2d at 1127.

[4] The motion was based upon a failure to state a claim upon which relief could be granted, as provided for by N.J. Ct. R. 4:6-2 (e).

[5] N.J. STAT. ANN. §§ 2A:18-61.1 to -61.12 (West Cum. Supp. 1980-1981). This statute is also known as the For-Cause Eviction Act or the No Cause-No Eviction Act.

[6] 165 N.J. Super. at 202, 397 A.2d at 1128. Attornment is "an act by which a tenant acknowledges his obligation to a new landlord." BLACK'S LAW DICTIONARY 119 (5th ed. 1979). *See* Del-News Co. v. James, 111 N.J.L. 157, 167 A. 247 (Sup. Ct. 1933).

[7] 165 N.J. Super. at 204, 397 A.2d at 1128.

[8] 165 N.J. Super. at 203, 397 A.2d at 1128. The tenants failed to bring to the court's attention any authority holding the Act applicable to actions other than summary dispossession. *Id.* The court was therefore "unwilling to expand the applicability" of the Act *sua sponte*. *Id.*

the ruling that the Anti-Eviction Act was not applicable to a mortgage foreclosure proceeding, and the appellate division reversed.[9] Writing for a unanimous panel, Judge King held that the Anti-Eviction Act was applicable to this type of proceeding and, absent good cause as provided in the statute, any removal of tenants was prohibited.[10] This clash between the rights of a foreclosing mortgagee and the protection afforded tenants by the Anti-Eviction Act is an issue of first impression in this state, and its resolution is replete with far-reaching ramifications.

On June 25, 1974, the Anti-Eviction Act became law in New Jersey.[11] The statute's enactment effectuated a change in the legal relationship of landlords and certain residential tenants.[12] Statutory rights and remedies, as well as those afforded by the common law,

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[9] 171 N.J. Super. at 423, 409 A.2d at 819. Following the lower court's denial of the tenants' motion to dismiss, both parties filed various motions: plaintiff moved to strike the tenants' answer; tenants moved for summary judgment, or in the alternative for a stay of the issuance of the writ of possession. On February 9, 1979, the court entered a summary judgment for the bank, denied the requested stay, and entered a final judgment of foreclosure on March 30. This was followed, on April 16, by the tenants' filing an appeal and notice of *lis pendens*. On the same day, the tenants sought a stay of the execution sale, which stay was denied. On July 10, 1979, however, the lower court ordered a stay of the judgment awarding possession to the bank, pending the appeal. *Id.* at 420-21, 409 A.2d at 817-18.

[10] *Id.* at 419, 409 A.2d at 819. Before addressing the primary issue of tenants and their rights vis-à-vis foreclosing mortgagees, however, the court was faced with a claim that the issue was moot, in that all the tenants had vacated the premises pursuant to an order of the Director of Property Conservation of Jersey City condemning the building. As explained by counsel for the tenants, this condition was caused by the "abandonment of the premises [by the mortgagor] following default," which led to "a state of disrepair resulting in the municipal order to vacate." *Id.* at 420, 409 A.2d at 817. Relying upon those representations, as well as affidavits filed by the tenants, the appellate court held that "the tenants continuing desire to move back into the premises sufficiently quicken[ed] the controversy to avoid the claim of mootness." *Id.* at 421, 409 A.2d at 818.

[11] Introduced in the Assembly on April 16, 1974 by Assemblyman Baer and numerous others, the Anti-Eviction Act was entitled: "AN ACT establishing grounds for evicting tenants and lessees of certain residential property, amending N.J.S.A. 2A:18-53 and repealing section 1 of P.L. 1973, c. 153 (C.46:8C-1)." 1974 N.J. Laws, Ch. 49. Attached to the Act, but neither part of the codification of Assembly Bill 1586, nor contained in LAWS OF NEW JERSEY 1974, was the following statement:

> At present there are no limitations imposed by statute upon the reasons a landlord may utilize to evict a tenant. As a result, residential tenants frequently have been unfairly and arbitrarily ousted from housing quarters in which they have been comfortable and where they have not caused any problems. This is a serious matter, particularly now that there is a critical shortage of rental housing space in New Jersey. This act shall limit the eviction of tenants by landlords to reasonable grounds and provide that suitable notice shall be given to tenants when an action for eviction is instituted by the landlord.

N.J. Ass. Bill 1586 (1974) (attached statement).

[12] The Act is inapplicable to "owner-occupied premises with not more than two rental units or a hotel, motel, or other guest house or part thereof rented to a transient guest or seasonal tenant." N.J. STAT. ANN. § 2A:18-61.1 (West Cum. Supp. 1980-1981).

were affected by the adoption of this remedial legislation.[13] Recognizing a critical housing shortage in the state, the New Jersey legislature promulgated this statute to impose limitations "upon the reasons a landlord may utilize to evict a tenant."[14]

At common law, a landlord was entitled to possession of the demised premises upon the expiration of the lease. A tenant who remained in possession after expiration was viewed as a tenant-at-sufferance, that is, "one who comes into possession of land by lawful title, but keeps it afterwards without any title at all."[15] The common law landlord was limited to two remedies in such a situation: he could enter the premises *vi et armis*, or he could prove superior title in an ejectment action.[16] The former, a self-help remedy, resulted in legal condonation of breaches of the peace; as a result, forcible entry and detainer statutes were enacted to protect a person in peaceful possession of property. The latter, a civil action brought in the law courts, determines who has the exclusive right to possession of property. The trial-type procedure followed in that action is unduly lengthy,[17] resulting in continuous pecuniary detriment to the landlord.

The legislative response to the perceived need for a swift method of removing a tenant-at-sufferance was the widespread creation of an abbreviated procedure through the summary dispossess statutes. Such laws generally provided for an expedited judicial determination of who is entitled to possession as between the landlord and tenant.[18] In New Jersey, summary dispossession was viewed as a procedural mechanism which aided in the enforcement of substantive rights, not as a grant of such rights.[19] The statute in New Jersey, moreover,

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[13] *See* 25 Fairmont Ave., Inc. v. Stockton, 130 N.J. Super. 276, 326 A.2d 106 (Dist. Ct. Bergen Cty. 1974); note 31 *infra*.

[14] N.J. Ass. Bill 1586 (1974) (attached statement). *See* note 11 *supra*.

[15] 2 W. BLACKSTONE'S COMMENTARIES 150.

[16] *Id.* See 3A G. THOMPSON, REAL PROPERTY § 1369 (repl. ed. 1961) for a discussion of these common law remedies and their application.

[17] *See* 3A G. THOMPSON, *supra* note 16, at § 1369.

[18] In New Jersey, the summary dispossess statute is N.J. STAT. ANN. §§ 2A:18-53 to -61 (West 1952). As stated in Vineland Shopping Center, Inc. v. DeMarco, 35 N.J. 459, 173 A.2d 270 (1961):

> The summary dispossess statute originated in 1847. . . . The purpose was to give the landlord a quick remedy for possession. Appellate review was barred, thus giving finality to the trial court's judgment with respect to possession. The tenant was remitted to an action for damages in which the judgment in the possessory action had no binding effect upon the ultimate merits of the case.

Id. at 462, 173 A.2d at 272.

[19] *See* Manahan v. City of Englewood, 108 N.J.L. 249, 157 A. 241 (Sup. Ct. 1931); Jonas Glass Co. v. Ross, 69 N.J.L. 157, 53 A. 675 (Sup. Ct. 1902). The Anti-Eviction Act—an amendment to New Jersey's summary dispossess statute—has, however, been construed to alter substantive property rights. *See* note 31 *infra*.

was codified as part of the jurisdictional grant to the county district courts.[20] This grant was "procedural" by its terms. In the past, the landlord's substantive property rights had emanated either from statutes other than summary dispossession or from the common law.[21]

In 1974, however, with the emergence of a statewide critical housing shortage, this limited view of summary dispossession in New Jersey was radically altered by the enactment of the Anti-Eviction Act.[22] The courts, in interpreting this Act, have stated that once an owner of property conveys a leasehold interest the owner has lost his right to possession; this right can be regained only if "the tenant is guilty of some act or omission which constitutes 'good cause' or [if] . . . the property is to be removed from the rental market."[23] Such interpretations have prompted landlords to challenge the Act as a taking of property without compensation, but the Act's constitutionality has been upheld insofar as it applies to the landlord-tenant relationship.[24] Whether the Act is properly applicable to other relationships requires a review of its terms and its interpretative case law.

The Anti-Eviction Act states that no tenant "may be removed by the county district court or the Superior Court" from premises leased for residential purposes unless good cause is established. Exempted from the enactment are "owner-occupied premises with not more than two rental units or a hotel, motel or other guest house or part thereof rented to a transient guest or seasonal tenant."[25] Thirteen subsections that follow enumerate eighteen separate grounds which constitute good cause.[26] In another section a landlord is prohibited from refusing to renew a lease without a section 2 good cause.[27]

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[20] N.J. STAT. ANN. §§ 2A:18-1 to -71 (West 1952).

[21] 25 Fairmont Ave., Inc. v. Stockton, 130 N.J. Super. 276, 281, 326 A.2d. 106, 109 (Dist. Ct. Bergen Cty. 1974). *See* Jonas Glass Co. v. Ross, 69 N.J.L. 157, 53 A. 675 (Sup. Ct. 1902).

[22] Stamboulos v. McKee, 134 N.J. Super. 567, 342 A.2d 529 (App. Div. 1975); 25 Fairmont Ave., Inc. v. Stockton, 130 N.J. Super. 276, 326 A.2d 106 (Dist. Ct. Bergen Cty. 1974).

[23] 25 Fairmont Ave., Inc. v. Stockton, 130 N.J. Super. 276, 283-84, 326 A.2d 106, 111 (Dist. Ct. Bergen Cty. 1974).

[24] *See* Puttrich v. Smith, 170 N.J. Super. 572, 407 A.2d 842 (App. Div. 1979); Stamboulos v. McKee, 134 N.J. Super. 567, 342 A.2d 529 (App. Div. 1975).

[25] N.J. STAT. ANN. § 2A:18-61.1 (West Cum. Supp. 1980-1981).

[26] *Id.* These causes are of two basic types; acts of the landlord/owner and acts of the tenant. *Id.*

[27] That section provides:

> No landlord may evict or fail to renew any lease of any premises covered by section 2 of this act except for good cause as defined in section 2.

N.J. STAT. ANN § 2A:18-61.3 (West Cum. Supp. 1980-1981). Further, the act prohibits tenant waiver of rights by stating:

> [a]ny provision in a lease whereby any tenant covered by section 2 of this act agrees that his tenancy may be terminated or not renewed for other than good cause as defined in section 2, or whereby the tenant waives any other rights under this act shall be deemed against public policy and unenforceable.

N.J. STAT. ANN. § 2A:18-61.4 (West Cum. Supp. 1980-1981).

Hence the statute, read literally, effectuates the legislature's purpose of preventing arbitrary and capricious evictions by landlords. The issue, therefore, is whether the statute should be read literally to forbid *any* court from ever removing a tenant absent a showing of the requisite good cause.

Good cause is described in the statute by reference to specific situations. Generally, if a tenant does not pay rent or engages in disorderly or destructive activities that tenant's landlord may seek his removal via summary dispossession.[28] A tenant may also be removed, in limited circumstances, where the landlord seeks to exercise his "ultimate" property right, that of removing the property from the housing market.[29] Severe penalties are imposed on a landlord who fabricates a claim of good cause.[30]

When first enacted, however, the Anti-Eviction Act did not contain many of the good causes associated with the landlord's exercise of his property rights. Therefore, the initial interpretive cases concerned the statute's constitutionality and breadth.[31] In *Stamboulos v.*

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[28] A tenant may be removed from the leasehold if that person: "Fails to pay rent due and owing," N.J. STAT. ANN. § 2A:18-61.1 (a) (West Cum. Supp. 1980-1981); "destroy[s] the peace, and quiet" of the building or neighborhood, *id.* at (b); damages the premises wilfully or through gross negligence, *id.* at (c); violates the reasonable rules and regulations of the landlord, *id.* at (d); breaches any lease covenant, *id.* at (e); fails to pay a reasonable rent increase, *id.* at (f); or, habitually fails to pay rent "which is due and owing," *id.* at (j).

[29] Good cause to evict exists where the landlord or owner: wishes "to permanently board up or demolish the premises," because of health and safety violations, where elimination of such violations would be "economically unfeasible," N.J. STAT. ANN. § 2A:18-61.1(g)(1) (West Cum. Supp. 1980-1981); attempts to comply with housing inspector directives, and compliance is "unfeasible" absent tenant removal, *id.* at (g)(2); "seeks to correct an illegal occupancy," subject to the same "unfeasible" standard, *id.* at (g)(3); "is a governmental agency [wishing] to permanently retire the premises" in pursuit of a blighted-area redevelopment plan, *id.* at (g)(4); desires to permanently retire the building from the residential market, *id.* at (h); proposes reasonable changes in the terms of the lease at its end, via a written notice, which the tenant refuses to accept, *id.* at (i); is converting to a condominium or cooperative, *id.* at (k); is converting to or constructing a condominium or cooperative, and the owner has contracted to sell the unit to a purchaser who will personally occupy it, *id.* at (*l*)(1); seeks to personally occupy a unit of certain condominiums or cooperatives "or has contracted to sell to a buyer seeking to personally occupy," *id.* at (*l*) (2); seeks, in a building containing three residential units or less, to personally occupy the tenant's unit, or has contracted to sell to a purchaser so desiring, *id.* at (*l*) (3); or, has conditioned the tenancy on the tenant's employment as superintendent or janitor, and such employment has been terminated, *id.* at (m).

The notice provisions of the Act vary from no notice required for failure to pay rent, *id.* at -61.2, to a three-year notice requirement when converting to a condominium or cooperative, *id.* at -61.2(g).

[30] N.J. STAT. ANN. § 2A:18-61.6. The penalty is usually treble damages plus attorney's fees and court costs. *Id.*

[31] In 25 Fairmont Ave., Inc. v. Stockton, 130 N.J. Super. 276, 326 A.2d 106 (Dist. Ct. Bergen Cty. 1974), a county district court was faced with the issue of whether the Anti-Eviction Act affected merely the procedure involved in a summary dispossess action or went to the substantive rights of a party to a lease. In holding that the statute "change[d] . . . the substantive

rights of landlords and tenants while also amending the jurisdictional and procedural requirements," *id.* at 283, 326 A.2d at 110, the court relied on a number of factors. Although it recognized that the statute was subsumed under the District Court Act, basically a procedural statute, the court felt the Act's title, "[a]n Act establishing grounds for evicting tenants and lessees of certain residential property," sufficed to comply with the state constitutional mandate that the title of an act must express its object. *Id.* at 284, 326 A.2d at 111. *See* N.J. CONST. art. 4, § 7, para. 4. The statute, in the opinion of the court, could therefore constitutionally change landlord-tenant law, and not merely the procedures of the county district courts. The court, moreover, made a distinction between a possessory right and a "right" to a summary proceeding, and noted that the latter is more akin to a privilege since it is a creature of the legislature. 130 N.J. Super. at 285, 326 A.2d at 111. The court implied that the legislature could repeal the summary dispossess statute while not affecting the landlord's right to possession since ejectment remained as a viable alternative. *See id.* at 285-86, 326 A.2d at 111-12. Citing the legislature's recognition of a critical housing shortage, the court sought to carry out their intent to change the "ancient rights of landlords" by limiting evictions to good cause. *Id.* at 287-88, 326 A.2d at 113.

Stockton was followed by the *per curiam* appellate division decision of Bradley v. Rapp, 132 N.J. Super. 429, 334 A.2d 61 (App. Div.), *certif. denied*, 68 N.J. 149, 343 A.2d 437 (1975). In that case tenants appealed a county district court decision wherein the landlord had been awarded possession without establishing good cause. The landlord had recently purchased a two-family home in West Orange and defendants were month-to-month tenants residing in one unit. A summary dispossess action was instituted against them, and the trial judge held for the landlord. 132 N.J. Super. at 431, 334 A.2d at 61-62. On appeal the decision was affirmed. The court dismissed the tenant's argument that the landlord's failure to prove good cause prevented tenant removal, and found that the "owner-occupied" exception applied to the facts presented. In an application of "common sense" rather than "scholastic strictness," the court held that in light of the fact that an owner residing in a two-family residence is exempt from the statute, a new purchaser desirous of immediately residing in one unit of a two-family residence is likewise statutorily exempt from the rigors of good cause. *Id.* at 433-34, 334 A.2d at 63.

In the wake of *Bradley's* expansion of "owner-occupied premises" came the decision in Sabato v. Sabato, 135 N.J. Super. 158, 342 A.2d 886 (Law Div. 1975). As in *Bradley*, the case involved purchasers of a house who wished to occupy one of the units and who brought a summary dispossess proceeding against the tenant. Here, however, the premises in question consisted of three units, clearly within the purview of the good cause provisions. *Id.* at 163, 342 A.2d at 888-89. The case was removed from county district court to the superior court, pursuant to the landlord's constitutional challenge to the Anti-Eviction Act. *See* N.J. STAT. ANN. § 2A:18-60 (West 1952) (summary dispossess proceedings may be transferred from the county district court to the superior court if the cause of action is "of sufficient importance"). After a review of the statute and the policy regarding judicial review of legislative enactments, the court found the statute unconstitutional. Sabato v. Sabato, 135 N.J. Super. at 164-68, 175-77, 342 A.2d at 889-91, 895-97. It characterized the tenants' ability to remain in possession absent good cause to evict as a "novel right" which usurped the landlord's fee simple absolute interest in violation of due process. *Id.* at 172, 175-76, 342 A.2d at 894, 895-96. The court criticized the legislature for not balancing the means utilized to protect tenants from arbitrary ouster against "basic rights of property owners." *Id.* at 175, 342 A.2d at 896. It held that the statute's "net effect is to unduly restrict the heretofore unrestrained transfer and use of such property, resulting in illegal confiscation without just compensation." *Id.* The court opined that its decision had not "diminished to any appreciable degree" the legislative goal of protecting tenants from arbitrary, capricious, or unfair removal. *Id.* at 176, 342 A.2d at 896. In concluding, Judge Scalero addressed comments to the legislature in two areas. First, he indicated a belief that the better course would have been enactment of specific restrictions on eviction, rather than a "blanket restraint" followed by numerous exceptions. *Id.* at 177, 342 A.2d at 897. In addition, the trial judge suggested that the legislature amend the Anti-Eviction Act to allow the landlord to exercise his own personal right to possession at either specified times, or limit this right to certain titleholders or certain types of property. *Id.* at 178, 342 A.2d at 897. These suggestions appear not to have fallen on deaf ears; *see* note 37 *infra* and accompanying text. *But see* Puttrich v.

McKee,[32] the court held that the Anti-Eviction Act did not violate an owner's fundamental property rights. New purchasers of a four-unit apartment building, intending to occupy one of the units in the building, brought a summary dispossess action against month-to-month tenants who had resided there for approximately twenty-eight years. In dismissing the purchaser's constitutional challenge as nonmeritorious, the court articulated the legislative intent underlying the statute as found in a statement attached to the legislation, and took judicial notice of a statewide critical housing shortage.[33] The court, in upholding the Act's validity, stated that "[p]rivate property rights are always subject to the reasonable exercise of the state's police power, where the protection of the health, safety and general welfare of the people are concerned."[34] The court did, however, question whether the failure of the initial 1974 enactment to provide for an owner-occupation exception to the no-eviction rule was a legislative oversight. While cognizant of possible unjust results in the future, this court displayed reluctance to correct the situation judicially. It viewed the appropriate remedy as being "amendatory legislation" rather than "judicial relief."[35]

In response to such suggestions from the judiciary, the legislature in 1976 passed substantial amendments to the rudimentary enactment. These additions were addressed primarily to the owner's possessory rights,[36] and in some respects served as a codification of early interpretative case law.[37] Until the decision in *Guttenberg*,

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Smith, 170 N.J. Super. 527, 407 A.2d 842 (App. Div. 1979) (partially overruling the *Sabato* decision to the extent it conflicts with Stamboulos v. McKee, 134 N.J. Super. 567, 342 A.2d 529 (App. Div. 1975)).

[32] 134 N.J. Super. 567, 342 A.2d 529 (App. Div. 1975).

[33] *Id.* at 569-73, 342 A.2d at 530-32.

[34] *Id.* at 572, 342 A.2d at 532.

[35] *Id.* at 573, 342 A.2d at 532. The court also dismissed an argument that the statute unconstitutionally impaired the freedom of contract, under the same reasonable-exercise-of-police-power rationale. *Id.* at 575, 342 A.2d at 533.

[36] *See* note 29 *supra*.

[37] For example, on July 16, 1975, thirty-three days after the decision came down in Sabato v. Sabato, 135 N.J. Super. 158, 342 A.2d 886 (Law Div. 1975), the sponsors of the Anti-Eviction Act introduced amendments to the Act. 1976 N.J. Laws, ch. 311. One of the additions to the good cause definition was N.J. STAT. ANN. § 2A:18-61.1(*l*)(3), which provides for good cause where:

> [t]he owner of a building of three residential units or less seeks to personally occupy a unit, or has contracted to sell the residential unit to a buyer who wishes to personally occupy it and the contract for sale calls for the unit to be vacant at the time of closing.

Compare this provision with the facts of *Sabato*, *see* note 31 *supra*, and Judge Scalera's suggestions to the legislature:

> It may well be that the Legislature will deem it appropriate or desirable to amend the act to require that a landlord's exercise of that right be invoked at cer-

however, there was only one reported decision construing the Act that did not originate as a summary dispossess action.[38] Moreover, the opinion rendered in that case failed to address directly the Anti-Eviction Act's applicability beyond summary dispossession.

In *Floral Park Tenants Association v. Project Holding, Inc.*,[39] two causes of action had been consolidated in the chancery division to determine the rights of tenants faced with a threat of removal.[40] Project Holding owned Floral Park Gardens, a three-hundred and seventy-four unit apartment complex in North Bergen. Project Holding had received approval and financial commitments from the Department of Housing and Urban Development to rehabilitate its buildings. To facilitate repairs,[41] Project Holding provided assistance for its tenants to relocate temporarily. The tenants association, in opposing the relocation and return plan, argued for a literal reading of the Anti-Eviction Act. Absent statutory good cause, it contended, tenant removal was prohibited.[42] The court disagreed. After review-

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> tain times (e.g., within a reasonable time after purchase or upon expiration of the term of an existing lease), or that it be limited to a certain class of persons holding title (e.g., individuals or their immediate family, or individual partners, as opposed to corporate owners), or *limited to certain types of property (e.g., buildings or structures ordinarily utilized for owner occupancy as opposed to large apartment houses or garden apartment complexes clearly representing "investment type" properties).* Whether any particular limitation or set of restrictions thus imposed will pass constitutional muster must, of necessity, await the presentation thereof to a court of competent jurisdiction.

135 N.J. Super. at 178, 342 A.2d at 897 (emphasis added). It should also be noted that the New Jersey Attorney General's Office appeared in *Sabato* as *amicus curiae*.

[38] Floral Park Tenants Ass'n v. Project Holding, Inc., 152 N.J. Super. 582, 378 A.2d 266 (Ch. Div. 1977), *aff'd sub nom.* Project Holding, Inc. v. Smyth, 166 N.J. Super. 354, 399 A.2d 1033 (App. Div. 1979) (*per curiam*). *See* notes 39-47 *infra* and accompanying text.

[39] 152 N.J. Super. 582, 378 A.2d 266 (Ch. Div. 1977), *aff'd sub nom.* Project Holding, Inc. v. Smyth, 166 N.J. Super. 354, 399 A.2d 1033 (App. Div. 1979) (*per curiam*).

[40] The landlord sought a declaratory judgment that its remaining tenants temporarily vacate their apartments to facilitate renovations; the tenants brought an action to enjoin and restrain their landlord from interfering with their possessory rights. *Id.* at 587, 378 A.2d at 269. The court felt it was confronted with a public policy dilemma:

> On the one hand, there exists the social legislation embodied in the Anti-Eviction Act aimed at protecting tenants and their right to housing against unreasonable and arbitrary eviction. On the other hand, there exists the public policy underlying numerous state and federal statutes aimed at promoting and expediting low and moderate-income housing because of its critical shortage.

152 N.J. Super. at 589, 378 A.2d at 270.

[41] *Id.* at 587-88, 378 A.2d at 269.

[42] The tenants argued that the Act made provisions for this situation via subsection (g)(2). *See* note 29 *supra*. They sought, therefore, protection under that subsection's three month notice provision, N.J. STAT. ANN. § 2A:18-61.2 (c) (West Cum. Supp. 1980-1981), and further procedures in accordance with the Relocation Assistance Act, N.J. STAT. ANN. §§ 52:31 B-1 to -12 (West Cum. Supp. 1980-1981), as well as relocation benefits as per N.J. STAT. ANN. §§ 20:4-1 to -22 (West Cum. Supp. 1980-1981). 152 N.J. Super. at 597, 378 A.2d at 274.

ing the history of the Act and relevant case law, the court held that "the statute was not intended to and does not apply to the instant case where temporary relocation is necessary to perform certain rehabilitation work which is brought about by a HUD-approved project."[43] In reliance on a common sense approach to statutory construction, the opinion viewed "eviction" and "removal" as acts of permanency, and refused to allow the statute to be interposed as an impediment to temporary removal.[44] This decision thereby departed from a literal application of the words[45] of the Anti-Eviction Act—the *Floral Park* court had successfully removed tenants without statutory good cause.

Unlike *Floral Park*, the lower court in *Guttenberg* addressed the applicability of the Anti-Eviction Act to causes of action other than summary dispossession,[46] and held that the Act pertained only to proceedings brought in the county district court.[47] Faced with somewhat ambiguous language in the statute, the trial judge stated that "the reference to the Superior Court is intended to apply to dispossess actions initiated in the county district court and removed to the Superior Court pursuant to [N.J. STAT. ANN. §] 2A:18-60."[48] In other words, the Anti-Eviction Act was held applicable only where a landlord sought tenant removal via summary dispossession; it did not pertain to any other instances where tenant removal was sought. Thus, according to the chancery court, a foreclosing mortgagee could have a court order the tenants to vacate.

The appellate division, however, disagreed with the rationale espoused below and held that the Anti-Eviction Act prohibited any judicial removal of tenants absent good cause as defined in the Act.[49] Its discussion of the applicability of the Anti-Eviction Act began and ended on the same note: foreclosure is not one of the statutorily enumerated good causes, and therefore judicial removal of these residential tenants was prohibited.[50] The court quoted from *Stamboulos*,[51] the leading authority for the constitutionality of the Act, to

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[43] 152 N.J. Super. at 593, 378 A.2d at 272.

[44] *Id.* at 592-97, 378 A.2d at 271-73.

[45] The tenants had argued for a literal reading, and therefore good cause to evict did not exist until there were substantial housing code violations, in accordance with N.J. STAT. ANN. § 2A:18-61.1(g)(2) (West Cum. Supp. 1980-1981). *See* note 42 *supra*.

[46] 165 N.J. Super. at 202, 397 A.2d at 1127-28.

[47] *Id.* 203, 397 A.2d at 1128.

[48] *Id.*

[49] 171 N.J. Super. at 423, 409 A.2d at 819.

[50] *See id.* at 421, 409 A.2d at 818 ("[f]oreclosure by a mortgagee is not one of the reasons"); *id.* at 423, 409 A.2d at 819 ("[f]oreclosure is not one of the causes").

[51] 134 N.J. Super. 567, 342 A.2d 529 (App. Div. 1975). For a discussion of this case, see notes 31-35 *supra* and accompanying text.

demonstrate the legislative intent to limit evictions to "reasonable grounds." Rejecting the chancery court's "judicial creativity through the application of maxims,"[52] the court refused to amend the Act judicially to include foreclosure as the nineteenth ground for the removal of residential tenants.[53] Judge King viewed the mortgagee as "almost always an 'eyes-open' commercial lender," to whom "the mortgage is essentially security for payment of debt."[54] Citing the legislature's purpose in enacting the Anti-Eviction Act as the palladium for low and middle income urban tenants, the court read the statute literally and refused to remove these tenants absent a showing of the requisite good cause.[55] This literal reading of the statute has broadened the scope of the Anti-Eviction Act to proceedings other than summary dispossession. Such a literal reading, however, while in accordance with societal concern for tenants, is open to question.

Historically, a mortgagee could enforce its rights in courts other than those with jurisdiction over summary dispossess actions.[56] The

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[52] 171 N.J. Super. at 423, 409 A.2d at 819. This comment refers to Judge Kentz' reliance on the principle that a statute is subject to strict construction when it is contrary to common law property rights. 165 N.J. Super. at 202, 397 A.2d at 1128. *See* Floral Park Tenants Ass'n v. Project Holding, Inc., 152 N.J. Super. 582, 591, 378 A.2d 266, 271 (Ch. Div. 1977), *aff'd. sub nom.* Project Holding, Inc. v. Smyth, 166 N.J. Super. 354, 399 A.2d 1033 (App. Div. 1979); Hill Manor Apts. v. Brome, 164, N.J. Super. 295, 309, 395 A.2d 1307, 1314 (Dist Ct. Essex Cty. 1978).

[53] This judicial reluctance to "legislate" has not been uniformly adhered to. See Bradley v. Rapp, 132 N.J. Super. 429, 334 A.2d 61 (App. Div. 1975), *certif. denied*, 68 N.J. 149, 343 A.2d 437 (1975) and Sabato v. Sabato, 135 N.J. Super. 158, 342 A.2d 886 (Law Div. 1975). In those cases new owners of two-family and three-family homes, respectively, were awarded judgments of possession against tenants residing therein, absent statutory good cause. While *Bradley* was a court-made definition of "owner-occupied premises," the *Sabato* case was clearly judicial legislation, as was illustrated when a subsequent amendment to the Act codified that court's holding. *See* notes 31 & 37 *supra*. *Cf.* Floral Park Tenants Ass'n. v. Project Holding, Inc., 152 N.J. Super. 582, 378 A.2d 266 (Ch. Div. 1977), *aff'd. sub nom.* Project Holding, Inc. v. Smyth, 166 N.J. Super. 354, 399 A.2d 1033 (App. Div. 1979) (Anti-Eviction Act held inapplicable to temporary relocation of tenants to facilitate renovations even though tenants would be returning to substantially different premises at higher rents).

[54] 171 N.J. Super. at 423, 409 A.2d at 819. The court elaborated further:

> In substance, the mortgage is essentially security for payment of debt. . . . To give a secured creditor a greater right than that of the landlord to evict nonoffending tenants upon the landlord's financial failure would be anomalous and would seriously thwart the legislative purpose.

Id. (citations omitted).

[55] *Id.* "We cannot conceive that the Legislature intended to allow foreclosing mortgagees to evict tenants from housing 'in which they have been comfortable and where they have not caused any problems.'" *Id.* (quoting from N.J. Ass. Bill 1586 (1974) (attached statement)). *See* note 11 *supra*.

[56] *See generally* R. CUNNINGHAM & S. TISCHLER, 29 NEW JERSEY PRACTICE, LAW OF MORTGAGES § 205 (West 1975). In New Jersey, upon the default of the mortgagor, the mortgagee is entitled, *inter alia*, to possession of the mortgaged premises. This right is enforceable by an action for possession, New Jersey's version of the common law ejectment action. N.J. STAT. ANN. § 2A:35-1 (West 1952). *See* note 65 *infra*. Prior to 1979, an action for possession

legislature, therefore, could not have intended the Anti-Eviction Act to preclude a mortgagee from enforcing his rights when the Act, by its terms, is not applicable to all of the courts with jurisdiction over mortgage litigation.[57] This perception of the legislative intent is bolstered by the fact that other remedial legislation in the landlord-tenant area is applicable specifically to all courts, in any type of proceeding.[58] In *Guttenberg*, the decision of the lower court turned on this construction of the Anti-Eviction Act,[59] but on appeal the court took the literal language of the statute somewhat out of context and applied it to the case at hand without thoroughly contemplating the precedent being set. The *Guttenberg* court failed to address fully the impact of its decision on a mortgagee's rights. A brief discussion of the relevant mortgage law principles will highlight the pervasive ramifications of this decision.

A mortgage is viewed today as conveying title to the property, a lien on the property, or an intermediate/hybrid having characteristics of both the title and lien theories. Of all the aspects in which these theories differ, only possession retains importance.[60] Title theory states regard the mortgagee as acquiring a right to possession upon the execution of the mortgage, subject of course to any contrary

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could be brought in two separate courts—the superior court or the county court where the land was situate. With the abolition of the county court system in 1979, however, an action for possession may now be maintained only in the superior court, which is constrained by the literal words of the Anti-Eviction Act. *See* N.J. Ct. R. 1:1-A. Since the Act specifically limits its scope to actions in the county district courts and the superior court, can it be said that in abolishing the county courts the State intended to preclude mortgagees from removing tenants, via an action for possession, in the exercise of their superior property rights?

[57] Indeed, it was not the intent of the draftsmen of the Anti-Eviction Act that it be applicable outside the landlord-tenant relationship. Kenneth E. Meiser, "one of the prime draftsmen of the Eviction For Cause Act," has made the following assertion:

> The Eviction For Cause Law affects only rights between landlords and tenants. It did not modify the rights of the state to oust a tenant through eminent domain proceedings or condemnation because the building is unfit for human habitation. Nor did it affect the right of a mortgagor [sic] to foreclose.

K. MEISER, TENANT-LANDLORD LAW IN NEW JERSEY 73-74, 75 (I.C.L.E. 1978) (footnote omitted).

[58] The Landlord-Tenant Reprisal Law, also known as the Retaliatory Eviction Act, N.J. STAT. ANN. § 2A:42-10.10 (West Cum. Supp. 1980-1981), provides that no landlord may serve a notice to quit or institute any type of action to recover possession of premises, "whether by summary dispossess proceedings, civil action for the possession of land, or otherwise" as a reprisal or in retaliation for a tenant's: good faith complaint to a governmental authority for health or safety violations; attempt to enforce contractual rights; organizing any type of lawful organization; or refusal to comply with substantial lease changes promulgated in retaliation for any of the aforementioned activities. *Id.*

[59] *See* notes 8 & 47-48 *supra* and accompanying text.

[60] G. OSBORNE, MORTGAGES § 13 (2d ed. 1970). *See* R. CUNNINGHAM & S. TISCHLER, *supra* note 56, at § 3; 4 AMERICAN LAW OF PROPERTY §§ 16.14-16.16 at 32-34 (A.J. Casner ed. 1952).

agreements.[61] Lien theory states, in contrast, never recognize a right to possession in the mortgagee.[62] New Jersey follows the hybrid theory which synthesizes the two. Until default, the mortgagor is entitled to possession, but upon default the mortgagee may take possession.[63] The mortgagee's right to possession was initially enforceable, *inter alia*, through an ejectment action.[64] This limited possessory interest, conferred by the hybrid theory, provides the most effective method of assuring the mortgagor's payment of his debt.[65]

In New Jersey, when a mortgage is recorded all concerned parties are deemed to have legal notice of its contents and thereafter "take" subject to the mortgagee's interest.[66] In the event of a default by the mortgagor, the recorded mortgagee has two options. He may enter into possession and enjoy an estate "with all the incidents of a common law title,"[67] or he may force a judicial sale of the subject premises in a foreclosure action.[68] Such a sale extinguishes all junior

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[61] This is the original common law view of a mortgage. G. OSBORNE, *supra* note 61, at § 14.

[62] *Id.* at § 15.

[63] *E.g.* Dorman v. Fisher, 31 N.J. 13, 155 A.2d 11 (1959); Sears, Roebuck v. Camp, 124 N.J. Eq. 403, 1 A.2d 425 (E. & A. 1938); Kirkeby Corp. v. Cross Bridge Towers, Inc., 91 N.J. Super. 126, 219 A.2d 343 (Ch. Div. 1966); Vineland Savings & Loan Ass'n v. Felmey, 12 N.J. Super. 384, 79 A.2d 714 (Ch. Div. 1950); Fidelity Union Trust Co. v. 75 Prospect Coop. Apartment, 131 N.J. Eq. 387, 25 A.2d 508 (Ch. 1942). *See* G. OSBORNE, *supra* note 61, at § 14.

[64] As stated in Fidelity Union Trust Co. v. 75 Prospect Coop. Apartment, 131 N.J. Eq. 387, 388-89, 25 A.2d 508, 509 (Ch. 1942):

> A mortgagee, upon breach of condition, has a right to the possession of the mortgaged premises which he can enforce by an action of ejectment. Since the mortgagee can maintain ejectment, *his right of possession runs not only against the mortgagor but against his grantees, lessees, and all persons whose title is subject to the mortgage.*

Id. (emphasis added).

[65] *See* R. POWELL, THE LAW OF REAL PROPERTY ¶ 454 (rev. ed. 1979).

[66] N.J. STAT. ANN. § 46:21-1 (West 1952). This statutory section is part of what is commonly referred to as the recording acts. *See* Kirkeby Corp. v. Cross Bridge Towers, Inc., 91 N.J. Super. 126, 134, 219 A.2d 343, 348 (Ch. Div. 1966) (tenants of mortgagor deemed on notice of mortgage); Iasillio v. Ackerman, 38 N.J.L.J. 274 (Dist. Ct. Bergen Cty. 1915); G. OSBORNE, *supra* note 61, at § 196.

[67] Kirkeby Corp. v. Cross Bridge Towers, Inc., 91 N.J. Super. 126, 131, 219 A.2d 343, 346 (Ch. Div. 1966). This right is subject to the mortgagor's equitable right to redemption, wherein the mortgagee's possession is divested by the mortgagor's satisfaction of the debt. *Id. See* N.J. STAT. ANN. §§ 2A:50-1 to -52 (West 1952 & Cum. Supp. 1980-1981); G. OSBORNE, *supra* note 61, at §§ 302-10; R. CUNNINGHAM & S. TISCHLER, *supra* note 56, at § 181.

[68] *See generally* N.J. STAT. ANN. §§ 2A:50-1 to -52 (West 1952 & Cum. Supp. 1980-1981). As a result of such a sale, the superior mortgagee has priority, over any subsequent interests in the property, to the proceeds of this forced judicial sale for the satisfaction of his debt. *See* note 77 *infra*. It is also worthy of note that:

> The purchaser of the mortgaged lands at a foreclosure sale, "takes the place of the mortgagee in proceedings in strict foreclosure at common law. His title relates back to the time of the execution of the mortgage. He succeeds as well to the title and

encumbrancers' interests in the property.[69] Thus, whether a tenancy is viewed as a purchase of an estate or an encumbrance on the landlord's estate, the proper recordation of a mortgage affects a subsequent tenant's right to possession.

From the foregoing, it is clear that the existence of a mortgage is a relevant consideration in the determination of a tenant's rights. The *Guttenberg* decision has, however, altered the rights of a mortgagee upon default. The court's failure to discuss fully the rights and liabilities of the mortgagee, the mortgagor, the tenants, and, most significantly, the purchaser at the foreclosure sale, diminishes the opinion's persuasiveness.

Guttenberg stands for the proposition that a foreclosing mortgagee may not remove tenants protected by the Anti-Eviction Act absent good cause. Because of the court's concern with protecting tenants who might be "unfairly and arbitrarily ousted from housing quarters in which they have been comfortable and where they have not caused any problems,"[70] the opinion overlooked a crucial issue presented on appeal—a mortgagee's rights. As a result of that oversight the heretofore settled property law principles attendant to the mortgage relationship have been rendered dangerously unsettled. A logical progression from *Guttenberg* would create an almost irreconcilable conflict between mortgage law and the Anti-Eviction Act. It is what the court did not state, rather than what it stated, that gives rise to this conflict.

First and foremost, Judge King did not hold that these subsequent-in-time tenants[71] were "subject to" the mortgage. If

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> estate acquired by the mortgagee by the delivery of the mortgage deed, as to the estate the mortgagor had at the time of the execution of the mortgage."

Sears, Roebuck v. Camp, 124 N.J. Eq. 403, 410, 1 A.2d 425, 429 (E. & A. 1938) (quoting Champion v. Hinkle, 45 N.J. Eq. 162, 165, 16 A. 701, 703 (E. & A. 1889)).

[69] Champion v. Hinkle, 45 N.J. Eq. 162, 165, 16 A. 701, 702 (E. & A. 1889). These junior encumbrancers must be made parties-defendant, or their interests survive the sale. *See* Koppel v. Olaf Realty Corp., 62 N.J. Super. 103, 115, 162 A.2d 306, 313 (App. Div. 1960).

[70] N.J. Ass. Bill 1586 (1974) (attached statement). See note 11 *supra* for the full text of the statement.

[71] The trial court noted:

> There is no evidence in the record, nor was it argued, that the tenants' interests are not subordinate to plaintiff's. In any event, such a factor would appear to be an affirmative defense to be pleaded in the tenants' answering, rather than the basis for a motion . . . .

165 N.J. Super. at 203 n.1, 397 A.2d at 1128 n.1.

Had the tenancies preceeded the mortgage, the mortgagee would take an inchoate possessory interest subject to the leases. The mortgagee would have no right to possession, unless there was an agreement to subordinate, *see* Kirkeby Corp. v. Cross Bridge Towers, Inc., 91

these tenants were subject to the mortgage, then *Guttenberg* merely limited a mortgagee's hybrid theory rights upon a mortgagor's default. So construed, this case has abolished a foreclosing mortgagee's right to *actual* possession, but his ability to gain a constructive possession of the mortgaged premises remains unaffected.[72] Alternatively, if the subsequent-in-time tenants are not subject to the mortgage, the Anti-Eviction Act, according to *Guttenberg*, has elevated tenancies which arise after a mortgage above the priorities scheme of the recording acts. This construction is in complete derogation of the recording act policy that a first-in-time interest in realty has priority.[73]

Second, the opinion specifically stated that it made no determination regarding the rights of a purchaser at the foreclosure sale.[74] Since any such ruling would have been *dicta*, the court was correct in declining to reach this issue. This omission, however, coupled with the failure to state specifically that the tenancies were subject to the mortgage casts some doubt upon what had been settled law. Normally, a tenancy subject to a mortgage terminates upon the sale of the property at foreclosure. The purchaser's title acquired at the judicial sale relates back in time to the date of the mortgage, and the property is conveyed free of any tenant's interest.[75] By not stating that the tenants were subject to the mortgage, and not indicating what rights a purchaser at foreclosure has, the *Guttenberg* court has left unanswered the question it created—whether the Anti-Eviction Act was intended to impair the value of the security given to a mortgagee for a debt.

N.J. Super. 126, 134, 219 A.2d 343, 348 (Ch. Div. 1966), since month-to-month tenancies are considered continuing tenancies. Stamboulos v. McKee, 134 N.J. Super. 567, 570, 342 A.2d 529, 530 (App. Div. 1975).

[72] In New Jersey, upon a mortgagor's default a mortgagee may take either actual or constructive possession. The former mode involves physical entry upon the premises by the mortgagee. *See* R. CUNNINGHAM & S. TISCHLER, *supra* note 56, at § 195. In the latter, no physical entry is involved, but there is exercise of "dominion and control" over the premises. Mere rent collection, however, has not been construed to constitute dominion and control. *See id.*; G. OSBORNE, *supra* note 61, at § 162. Moreover, an alternative to any sort of possession is a court-appointed rent receiver. "The appointment of a receiver in the foreclosure suit is a substitute for the ejectment or the taking possession of the property." Fidelity Union Trust Co. v. 75 Prospect Coop. Apartment, 131 N.J. Eq. 387, 389, 25 A.2d 508, 509 (Ch. 1942).

[73] *See* N.J. STAT. ANN. §§ 46:16-1 to 46:22-4 (West 1940 & Cum. Supp. 1980-1981).

[74] 171 N.J. Super. at 421, 409 A.2d at 818. *See* note 68 *supra*.

[75] Ellveeay Newspaper Workers' Bldg. & Loan Ass'n v. Wagner Market Co., 110 N.J.L. 577, 580, 166 A. 332, 333 (Sup. Ct. 1933), *aff'd*, 112 N.J.L. 88, 169 A. 692 (E. & A. 1933). The lease is not terminated, however, where the tenant is not made a party-defendant to the foreclosure action. *Id.* at 580, 166 A. at 333. *See* Walgreen v. Moore, 116 N.J. Eq. 348, 173 A. 587 (Ch. 1934); Guardian Life Ins. Co. v. Lowenthal, 13 N.J. Misc. 849, 181 A. 897 (Sup. Ct. 1935).

Where mortgaged property is sold at a foreclosure sale there are two possible results.[76] Where the property is sold for at least the outstanding amount of the note or bond, the proceeds go to the foreclosing mortgagee with any excess distributed in accordance with the priority scheme.[77] Where the sale results in a deficiency,[78] however, the mortgagee is forced to seek recourse from the mortgagor personally.[79] Problems may arise, though, if tenants whose leaseholds commenced subsequent to the mortgage are allowed to remain in possession after the foreclosure sale,[80] possibly decreasing the value of the property, and relegating the mortgagee to a deficiency judgment. Such prejudice to the mortgagee would result if the Anti-Eviction Act were held to be applicable to a purchaser at the foreclosure sale. The Act would thereby impair the security given for the debt.

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[76] These results are, of course, exclusive of the possibility of settlement.

[77] For purposes of this analysis, an abbreviated explanation will suffice. In actual practice the proceeds from the foreclose sale are distributed in the following fashion:

> [F]irst, . . . to the costs of the selling officer for sale of the property . . . ; secondly, to the taxed costs of the plaintiff, or any prevailing mortgagee or party; then to the satisfaction of the mortgage debt of such party; and lastly, to the taxed costs of the subordinate encumbrancers and their debt in the order of priority as fixed in the judgment and execution.

R. CUNNINGHAM & S. TISCHLER, *supra* note 56, at § 381 n.1.

[78] A deficiency judgment is "[t]hat part of a debt secured by mortgage not realized from sale of mortgaged premises." BLACK'S LAW DICTIONARY 379 (5th ed. 1979).

[79] Prior to the recent amendment to N.J. STAT. ANN. § 2A:50-2 (West Cum. Supp. 1980-1981), the holder of a note secured by a mortgage could proceed either against the individual personally or against the property for satisfaction of the debt, while the holder of a bond and mortgage was forced to foreclose on the property before any action could be commenced against the individual debtor. The recent amendment, however, has changed this "option" of the noteholder. Now any proceeding to collect a debt secured by a mortgage must begin with foreclosure. *Id.*

[80] A different result would be arrived at if the Act were interpreted to be applicable only in summary dispossess actions—the view espoused by Judge Kentz. *See* notes 47-48 *supra* and accompanying text. It may also be argued that the statute's ban on tenant removal is inapplicable to the purchaser at foreclosure, as the title given by the sheriff is free of all subsequent encumbrances. Thus all tenancies are extinguished. *See* note 68 *supra*. With the tenancies terminated in this fashion, a court could issue a writ of possession in favor of the purchaser. One authority notes:

> It is an obvious principle that, absent a power conferred by statute or express grant or reservation, a grantor cannot convey an estate which is greater or will endure for a longer period than his own. So if a lessor whose estate is one for life or is otherwise limited or conditioned makes a lease for a term which has not expired when the lessor's estate ends, the lessee's estate nevertheless terminates. Likewise, where the lessor's estate is subject to a prior mortgage or other lien, the lessee's estate is terminated by sale on foreclosure where he is made a party to the proceedings.

1 AMERICAN LAW OF PROPERTY § 3.101 (A.J. Casner, ed. 1952) (footnotes omitted).

The resolution of this conflict between the Anti-Eviction Act policy and the first-in-time, first-in-right policy underlying the recording acts and mortgage law should be left to the legislature, which is in the best position to resolve it. Nevertheless, an analogy may be drawn to the mortgage law concept of marshalling in an effort to illustrate the possibility of a foreclosure sale which would respect both policies.

Marshalling is a principle of equity wherein the immediate burden of debt satisfaction at foreclosure is directed solely at the interest of the mortgagor, and only upon the depletion of his resources is a foreclosing mortgagee permitted to extinguish the interests of subsequent purchasers or junior encumbrancers. Equity seeks, through marshalling, to protect parties with an interest in property subject to a superior mortgage. The principle mandates that subordinate interests shall be extinguished via foreclosure only where the senior mortgagee will otherwise be prejudiced.[81] One particular marshalling concept, the two funds doctrine,[82] presents a reasonable solution to the conflicting interests of the mortgagee and the tenants protected by the Anti-Eviction Act.[83]

The two funds doctrine is utilized where the mortgagor owns two separate parcels of property, with both subject to a first mortgage, and one subject to a second mortgage, lien, or other encumbrance. This doctrine requires that upon the mortgagor's default the first

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[81] G. OSBORNE, *supra* note 61, at § 286; R. CUNNINGHAM & S. TISCHLER, *supra* note 56, at § 335.

[82] *E.g.*, Sternberger v. Sussman, 69 N.J. Eq. 199, 60 A. 195 (Ch. 1905), *aff'd*, 85 N.J. Eq. 593, 98 A. 1087 (E. & A. 1916).

[83] In addition to the two funds doctrine, marshalling includes another distinct principle—the inverse order of alienation rule. This rule is invoked when a common grantor who has mortgaged property sells off parcels of the tract subject to a mortgage on the whole. The rule holds that upon foreclosure, the debt will be first satisfied from any property remaining with the mortgagor, and then from the parcels sold subject to the mortgage, in the inverse order of those sales. *E.g.*, Ocean County Nat'l Bank v. J. Edwin Ellor & Sons, 116 N.J. Eq. 287, 173 A. 138 (Ch. 1934). The "inverse order" element requires that the mortgagee, after exhausting this recourse against property held by the mortgagor, must proceed against property alienated by such mortgagor in reverse chronological order of such alienation. In this manner the mortgagor is initially held accountable for his default, after which his subsequent purchasers are. For a discussion of this rule see G. OSBORNE, *supra* note 61, at § 287.

The inverse order of alienation rule might also provide a solution to this conflict between the Anti-Eviction Act and the mortgagee's rights. If the leasehold is viewed as a parcel of the entire estate, in essence a temporal parcel, which is sold to a subsequent purchaser (here, the tenant who acquires the apartment subsequent to the mortgage), this rule presents a valid analogy. The common grantor would be the mortgagor-landlord, whose property—both the reversionary interest in the apartments and the right to rents—would initially be sold. Where this sale did not produce enough money to satisfy the debt, the tenants could be removed in the inverse order of the commencement of their tenancies until the sale of the property satisfied the debt.

mortgagee proceed initially against the property subject solely to his mortgage. Only when that sale is insufficient to satisfy the debt may the senior mortgagee proceed against the property encumbered by both his mortgage and a junior interest.[84]

In order to utilize the rationale of the two funds doctrine in a *Guttenberg*-type situation, the mortgaged premises must be viewed as two distinct properties to be bid on at the foreclosure sale, one with the tenants remaining in possession and one with the tenants removed. If the tenancies are viewed as a quasi-lien on the premises,[85] the mortgagee should first proceed against the premises with the tenants remaining in possession in an attempt to satisfy the debt. Only when the debt would not be satisfied from this sale might the premises be sold free of the leaseholds, thereby extinguishing the junior quasi-lienor's interest.[86]

As noted earlier, the Anti-Eviction Act and the recording acts cannot be reconciled in those instances where the foreclosure sale fails to satisfy the debt because the tenants are allowed to remain in possession. There remains the societal concern about a statewide critical housing shortage, as evidenced by an act designed to lend a degree of predictability to the rental market. In contrast to that concern is the hallmark of all real estate titles—the recording system. Usually the policies underlying these concerns are quite distinct. If the policies are viewed as parallel lines, the *Guttenberg* decision has deflected the Anti-Eviction Act line so that it intersects the recording acts' line at the point where the property with the tenants in possession fails to satisfy the debt. When the lines intersect, either the tenants must be removed or the prior-in-time mortgagee must be deemed subsequent in right.

It may be helpful to demonstrate factually this ultimate policy confrontation. The mortgage in *Guttenberg*, for example, secured a debt of $30,000. If the property could be sold at the foreclosure sale for at least this amount *with* the tenants remaining in possession, a strong policy argument could be advanced that the tenants not be removed absent good cause. The mortgagee would recover the amount due him via foreclosure. However, if the property could be sold *vacant* for an amount in excess of the debt, say $35,000, but with the tenants remaining it could not be sold for the amount of the debt, say $25,000, a confrontation between the policies would arise. Hence,

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[84] G. OSBORNE, *supra* note 61, at § 286.

[85] *See* text accompanying note 84 *supra*.

[86] Such sale should only occur if the sale of the vacant premises would command a bid high enough to discharge the indebtedness.

with the tenants remaining in possession the mortgagee would be left with a deficiency of $5,000, a now unsecured obligation of the mortgagor. Such a result would mean that the tenants were not subject to the mortgage. These subsequent purchasers of an interest in a mortgaged premises would then be elevated above the recorded interest of the mortgagee, and the policy behind the recording acts would be rendered meaningless.

The possibility of a deficiency judgment at the foreclosure sale logically appears to be the point where one policy must yield. If the debt secured by the mortgage is satisfied by the judicial sale of the premises without the tenants being removed, there appears to be no need for removal. If, however, there would be a deficiency judgment with the tenants remaining in possession, but there would be no deficiency with the premises sold vacant, a strong argument may be made for removal. This result would give as much deference as possible to the Anti-Eviction Act without infringing on the rights of a secured creditor, *i.e.*, the mortgagee. A solution to the mechanics of such a judicial sale would probably necessitate legislative action, but the aforementioned principles of marshalling might serve as models for such a procedure.

There are obviously problems attendant upon these suggestions.[87] On a practical level, the uncertainty of the tenants' rights during the period from default until the foreclosure sale leaves the tenants in an ambiguous situation until it is determined whether there will be a deficiency. Where the tenants are required to vacate after the sale, the time they will be allowed to remain on the premises while seeking another residence during this period of a critical housing shortage requires resolution. The relatively long notice provisions of the Anti-Eviction Act[88] suggest one response, but are by no means a definitive answer. Such problems will certainly arise, and their disposition will require a careful legislative analysis of societal interests.

The theories offered by this note are advanced to illustrate an equitable method of rendering compatible the policies behind the Anti-Eviction Act, landlord-tenant law, the recording acts, and

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[87] A difficult problem might be the procedure to be followed at the foreclosure sale. The possibility of two or more types of bids on the premises could easily lead to confusion and uncertainty for all involved. Moreover, the mortgagor's statutory right of redemption after the foreclosure sale further complicates matters, since N.J. STAT. ANN. § 2A:50-4 (West 1952 & Cum. Supp. 1980-1981) provides the mortgagor with a six-month period after the foreclosure sale within which he may recover the property by payment of the debt.

[88] N.J. STAT. ANN. § 2A:18-61.2 (West Cum. Supp. 1980-1981). *See* note 29 *supra*.

mortgage law. These analyses, however, rest on the premise that where the policies irreconcilably conflict, the secured interest of the mortgagee will override the tenants' interest in non-removal from the leasehold absent good cause. This conclusion has not been drawn by the New Jersey courts or legislature to date. Indeed, the issue has yet to be considered. Until such a determination is reached, *Guttenberg* and its progeny will serve as food for thought.

Harold N. Hensel