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Foreclosure and Sale

Arthur E. Sutherland Jr.

FORECLOSURE AND SALE

Some Suggested Chauges in the New York Procedure

ARTHUR E. SUTHERLAND, JR.

The iniquitous character of one who forecloses a mortgage is firmly fixed in the minds of many. I can recall no story in which the hero is a mortagee, but the worthy debtor who is ousted from his old homestead by foreclosure is a familiar literary figure.[1] Undoubtedly the idea that creditors often seek to get valuable property for an inadequate price by foreclosing mortgages has had much influence on popular thought, and our legal procedure has been shaped accordingly. The requirement of the New York Civil Practice Act that in every action to foreclose a mortgage the judgment must direct a public auction of the mortgaged lands[2] is obviously designed to protect the debtor by guaranteeing to him the true value of his equity. This paper gives the results of some inquiry as to the real worth of this procedure, and is intended to suggest that in always requiring a sale we have possibly been governed more by sentiment than by reality.

I

Two provisions of New York law give special protection to the defendants in a foreclosure action. First, no judgment of foreclosure can be entered merely on the defendants' default: the amount of the debt must be determined by a computation which may be made by the court, but which as a general rule is made by a referee appointed for the purpose.[3] Next, when the extent of the debt is so determined and the plaintiff becomes entitled to a judgment, it must direct that the property (or enough of it to satisfy the debt) be sold.[4] The sale must be at public auction[5] after six weeks of newspaper advertising in small communities[6] and three weeks in cities or incorporated villages of the first class.[7] The sale may be conducted by the sheriff, but the general practice is to appoint a referee for the purpose.[8]

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[1]That most ingenious advocate, Mr. Ephraim Tutt, recently foiled a covetous mortgagee, to the great satisfaction of the reader, in Mr. Arthur Train's story, "A Leaf from King John", which appeared in the Saturday Evening Post for July 18, 1936.

[2]N. Y. CIV. PRAC. ACT (1920) §§ 986, 1082. This statute is hereafter cited as C.P.A.

[3]N. Y. CIV. PRAC. RULE 256.

[4]C.P.A. § 1082.

[5]C.P.A. § 986.

[6]C.P.A. § 712.

[7]C.P.A. § 986. The newspaper advertising must appear once a week if published for six weeks, or twice a week for three weeks, if one newspaper. In New York and Kings Counties, however, publication must be in two such daily papers. Public posting of the notice of sale is also required in certain cases. See C.P.A. §§ 712 and 986.

[8]This paper does not attempt to discuss foreclosures by advertisement and sale

The theory of the public auction is that the owner of a substantial equity is thus assured of having its value returned to him as "surplus moneys", or at worst, that in case the competitive bidding for the property fails to bring a price equal to the debt and costs, it will at any rate fix the true value of the mortgaged realty and so limit to a just amount any deficiency judgment which may be entered. However, both these results can be obtained only where there are actual competing bids at the sale; and actual bidding at a foreclosure sale today is very rare.[9] The mortgagee has ordinarily used every resource to encourage the debtor to keep up his interest and taxes, and comes to foreclosure only when the case is hopeless. The great lending institutions are reluctant to load themselves with foreclosed real estate; but the debtor who is unable to keep up his taxes and interest is generally without friends who have the money to bid in the property on the courthouse steps. If he has the friends, they ordinarily come to his aid before the foreclosure is started. As a result, the "auction" is very often attended only by the referee and by the plaintiff's attorney, who patiently waits until the terms of sale are read and then buys the property without competition.

A person not learned in the law who enters a county courthouse at ten or eleven o'clock in the morning must be puzzled by the transactions on the steps or in the front vestibule. He will see anywhere from one to a dozen or more young men, cach reading in a drone from a little printed strip of paper. No one listens to their words. From time to time one of the readers stops, whereupon an officious bystander speaks to him in a low tone and gets his signature on a printed blank. The reader walks away. Quite possibly the curious layman would be surprised to be told that he was seeing an auction, and that the young men reading from little slips of paper are referees, appointed by the Supreme or County Court to sell foreclosed lands; that the only bidding is the mention of the price by the mortgagee's attorney, which is followed immediately by the signature of a memorandum of sale by the referee. After watching a few of these transactions, the layman begins to doubt whether any good purpose is served by requiring the holder of a defaulted mortgage to pay a referee to compute the amount already admitted to be due by the defendant's failure to answer; and by requiring him to pay a newspaper for publishing an advertisement of the sale, and to pay a referee

without action under Article 17 of the N. Y. REAL PROP. LAW. The procedure is rigid and technical, and so liable to produce defective titles. Hence it is little used. See 1 WILTSIE, MORTGAGE FORECLOSURE (4th ed.) § 33. One of the senior members of the Rochester Bar is regarded with some awe because he is supposed once to have conducted such a foreclosure!

[9]There is no way in which statistics can be compiled on the number of foreclosure sales at which the plaintiff has been the only bidder. I think most lawyers who see much of foreclosures will agree that this has occurred in the great majority of cases in the last few years. The very small number of sales in which surplus moneys are produced (discussed later in this paper) confirms this impression.

to go through the motions of an auction, when everyone concerned knows that the net result will be the acquisition of title by the creditor.

Large lending institutions such as savings banks and insurance companies are required by statute in New York to lend only such portion of the value of mortgaged realty as will leave a substantial equity.[10] If the statutory requirement of advertisement and sale is performing any useful function, in the thousands of foreclosure sales held in this state in the past two or three years[11] there should have been many instances in which the bidding produced a surplus over the mortgage debt and costs. On the contrary, however, the general experience of lawyers and such statistics as can be found alike indicate that surplus moneys are almost non-existent. In Monroe County[12] there were 1266 foreclosure sales in 1934, 2312 in 1935, and 1285 in the first eight months of 1936. Of these 4863 sales, only six produced surplus moneys.[13] There is no reason to suppose that bidders are any more eager in

[10]A savings bank may lend to the extent of sixty per cent of the appraised value of the realty. BANKING LAW § 239-6. Commercial Banks may lend two-thirds of the appraised value. BANKING LAW § 108-4 (a). Trust Companies may lend up to sixty per cent. BANKING LAW § 193. Savings and Loan Associations may lend eighty per cent of the appraised value of improved realty. BANKING LAW § 386-5. Insurance Companies may lend on real security "worth fifty per centum more than the amount loaned thereon." INSURANCE LAW § 16.

[11]Statistics on this subject are hard to find. The Judicial Council is not as yet compiling figures on the number of foreclosure actions in Supreme and County courts. Through the courtesy of Mr. Roy F. Bush, Monroe County Clerk, and several of his assistants, I have been able, however, to consult reports from that office submitted to the Federal Home Loan Bank Board, and have had the operation of certain of the registers made clear to me. The Division of Research and Statistics, Federal Home Loan Bank Board, has obtained reports on the number of foreclosure sales in communities which contain sixty-four per cent of the population of New York. In these communities there were in recent years the following foreclosures:

1932	18,432
1933	19,903
1934	23,321
1935	25,641

The first four months of 1936 are reported as follows:

January	1820
February	1789
March	1953
April	1997

[12]Monroe County had at the time of the 1930 census a population of 423,881; it contains the City of Rochester with a population of 328,132.

[13]These figures are derived from the Court and Trust Fund Register, kept in the Monroe County Clerk's office. Whenever a judgment of foreclosure and sale is entered, a clerk notes in this register the title of the action, the date of the judgment, and the file references. He makes a special notation in case the action does not involve the foreclosure of a mortgage. When the referee's report of sale is entered, an additional notation is made on the register showing whether the report indicates a deficiency or a surplus, and the amount in case of a surplus. The surplus moneys in the six instances mentioned, were:

$1440.24
2381.00
165.61
68.23
1017.74
87.14
$5159.96

other counties. It seems a safe conclusion that advertisement and sale are of very little use in obtaining for the mortgagor a cash surplus to represent his foreclosed equity.

The other function of advertisement and public sale—that of fixing the just amount of the deficiency judgment to be entered—fails of performance because of the same lack of bidding. The New York emergency mortgage legislation has recognized this failure and has forbidden the entry of a deficiency judgment on the foreclosure of a mortgage made before July 1, 1932, unless the court finds the reasonable market value of the realty to be less than the debt and costs, permitting in that case a deficiency judgment for the difference.[14] The legislature very evidently considered that the bidding at the statutory auction was no just indication of the true worth of the mortgaged property, and substituted the "emergency" rule to prevent the creditor from taking by foreclosure property of value equal to the debt and costs and still entering a deficiency judgment against the mortgagor.[15] Most foreclosures at the present time are affected by this legislation.

It is a fair general statement that foreclosure in New York today is only a means for the mortgagee to acquire title to the mortgaged property, which in most cases extinguishes the debt.[16] Consequently in some instances the debtor even maneuvers to drive the creditor to foreclosure, hoping thus to be rid of

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In a few instances the entry "no deficiency" occurs; but in the overwhelming majority of cases the notation indicates that the sale failed to bring a bid equal to the debt and costs. The register does not give the amount of deficiencies; nor are these amounts particularly significant. The creditor ordinarily bids some arbitrary sum, less than the debt, and buys the property in without competition.

The figures representing the total numbers of Monroe County foreclosure sales in 1934, 1935, and the first eight months of 1936 were compiled from the Court and Trust Fund Register by one of the County Clerk's staff for the Federal Home Loan Bank Board.

[14]C.P.A. § 1083 A. *Limitation upon deficiency judgments during emergency period.*

[15]As the statute limiting the entry of deficiency judgments (C.P.A. § 1083 A) has no application to any mortgage dated on or after July 1, 1932, foreclosure of recent mortgages may result in the entry of deficiency judgments for the difference between the bid and the debt and costs, no matter how inadequate or non-competitive the bid. A number of such recent mortgages held by the Home Owners Loan Corporation are now under foreclosure in Monroe County. As these were all made on careful appraisals, and the amount loaned was supposedly not more than eighty per cent of the value of the mortgaged land, there should originally have been an equity of at least twenty-five per cent of the amount of the loan in every case. See HOME OWNERS' LOAN ACT OF 1933, 48 STAT. 128 (1933) c. 64 § 1, 12 U. S. C. A. § 1463 (d). Why should the law permit the mortgagee to bid in the premises and still enter a deficiency judgment where the default of interest and taxes does not exceed twenty-five per cent of the principal of the mortgage debt, and there is no showing of a decline in the value of the premises?

[16]One exception, already discussed, is in the case of mortgages dated on or after July 1, 1932. Another is found in the rare instance where the creditor can show that the property sold did not at a fair valuation equal the debt and other charges. See C.P.A. § 1083 A. No figures have been collected showing the number of deficiency judgments entered pursuant to the emergency legislation; my own experience convinces me that they are granted in a very small proportion of foreclosures of mortgages to which that legislation applies.

his personal liability before the emergency legislation becomes inoperative. It seems no unfair summary to say that in the average case the reference to compute and the advertisement and sale perform no useful service to justify their cost.

This cost is substantial. In Monroe County most foreclosure advertising is published in the official court newspaper, and costs about $35.00 for six insertions of the average size. Most referees are paid a fee of $50.00 for their entire services in computing the sum due and in "auctioning off" the property.[17] If $85.00 is a fair average cost of computation, advertisement, and sale in a Monroe County foreclosure action, then in the 4863 sales of mortgaged realty occurring there in 1934, 1935, and the first eight months of 1936, a total of about $400,000.00 was paid by disappointed mortgagees for referees' fees and advertising, with no benefit to anyone but the referees and the newspapers. If the same cost is a fair average throughout the state of New York, then in the 56,521 foreclosure sales occurring in 1934, 1935, and the first four months of 1936 in the communities reporting to the Federal Home Loan Bank Board, representing only sixty-four per cent of the population of the state, a total of over four and three-quarters millions of dollars was uselessly spent for referees' fees and advertising.[18] The expense for the entire state must be very much greater;[19] and the anticipation by lending institutions of the delay and expense of realizing on real security must materially increase the difficulty of obtaining mortgage loans at reasonable interest rates throughout the state.

It seems sensible to recognize that in the average case the reference to compute and advertisement and sale impose a burden on the creditor with no

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[17]Where the creditor bids in the property on the foreclosure sale and his bid is simply credited on the debt, the referee's commissions for sale are limited to $25.00. C.P.A. § 1546. For "computing the amount due" (i.e., checking over some arithmetic prepared by the plaintiff or the plaintiff's attorney) the referee is entitled to $25.00. C.P.A. § 1545.

If the plaintiff were suing on the debtor's unsecured bond, the defendant's failure to appear or answer would permit the plaintiff to take judgment for the amount demanded in the complaint with interest and costs, without the intervention of a referee or judge to make a computation. The plaintiff could then sell the defendant's realty on execution.

Perhaps the historical difference between procedure at law and in equity accounts for this difference in the effect of a failure to answer. Whatever its origin, there seems no good reason today to perpetuate it. Why should a default in pleading be more conclusive for a debtor who has not mortgaged his house than for one who has so secured the debt?

[18]For the sources of these statistics, see *supra* notes 11 and 13. If 1933 and 1932 were included, the total expense would be much greater, of course; but the year 1934 was the first in which the number of sales resulting in surplus money was examined.

By no means forgotten is the fact that in times of great distress referees' fees have been of great help to many a needy lawyer. What is meant by the useless expenditure of this money is that it accomplished nothing useful for the parties to the litigation. The Bar is not entitled to regard itself as the beneficiary of a special sort of mortgage tax.

[19]The total cost of computation, advertisement, and sale is probably more than

benefit to the debtor; and we might well so change our foreclosure practice as to provide a cheap and quick way for the mortgagee to perfect title to the security without sale, in case he is willing to consider the debt thus satisfied, and in case the subsequent lienors or the owners of the equity do not consider that their interests justify an application for a judgment requiring sale.[20]

To foreclose a mortgage, the plaintiff could file a lis pendens and summons and complaint and serve all persons having an interest in the realty subordinate to the mortgage under foreclosure. If all defendants defaulted in appearance or pleading, the plaintiff would be entitled immediately to a decree declaring that he had complete and perfect title to the mortgaged property and that the mortgage debt was satisfied. If any defendant considered that the mortgaged property had surplus value, he would have a right to serve an answer demanding a sale. To prevent the service of such demands merely for their nuisance value, the demand should be ineffective unless the answering defendant posted a surety bond for a moderate sum, to secure the plaintiff for the cost of the referee's fees, the expense of advertising, and the loss caused by the delay. No computation would be necessary unless some defendant by answer questioned the amount claimed by the plaintiff in his complaint. Infants, incompetents, or "poor persons",[21] upon a proper showing that a sale was needed, could obtain an order dispensing with the posting of security.[22]

If a plaintiff should consider the value of the premises so small that a deficiency judgment was proper, he should be required to demand a sale in his complaint, and (as under the present "emergency" statute) should be granted a deficiency judgment only for

> ". . . an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus costs and disbursements of the action including the referee's fee and disbursements, less the market value as determined by the court or the sale price of the property whichever shall be the higher."[23]

$85.00 in the average case in New York City. See for example the special provisions of C.P.A. § 986 requiring publication in *two* daily papers in the counties of New York and Kings.

[20]Proposed amended sections of the Civil Practice Act are added as an appendix at the end of this article.

[21]C.P.A. §§ 198, 199.

[22]Of course many interesting questions of detail arise. Liens of the people of the state for franchise taxes accruing against corporate mortgagors, or for transfer or estate taxes can be cleared off by a superior mortgagee under C.P.A. §§ 214 and 221. Under the suggested practice the People presumably ought not to be required to post a bond to obtain a sale, but if the People demand a sale, they should be required to pay costs in case the sale produces no bid sufficient to pay the debt and the expenses.

[23]C.P.A. § 1083 A. The reenactment of this section in permanent form is not a necessary part of the plan of short foreclosure here advocated, but the section seems eminently just. This limitation on deficiency judgments would certainly be constitutional as to mortgages made after it was enacted, and should be valid even as to previous mortgages. Has a mortgagee a vested right in a form of procedure that

The suggested short form of foreclosure should eliminate most deficiency judgments. In the great majority of cases, lending institutions would prefer to acquire title with no delay and with a substantial saving in disbursements rather than to undergo the expense and delay of advertisement and sale in the hope that a deficiency judgment could be obtained and collected. Furthermore, examination of the title by subsequent purchasers would be simplified. Where the short form was used, the examiner would be spared the duty of inspecting the proofs of posting and the referee's report of sale to make sure that the rigid requirements of the statute were carried out.[24] The work of the attorney conducting the foreclosure action would be much lightened, and perhaps the cost of his services to his client thus diminished. Delay, uncertainty, cost—these are the layman's most persistent criticisms of legal procedure. All three defects would be improved by the suggested amendment.

II

For at least a century and three quarters, foreclosure with sale under judicial decree and strict foreclosure have existed side by side under the New York law, although, since the adoption of Part II of the Code of Civil Procedure in 1880, foreclosure without sale has been available only

> "in an action brought to foreclose or extinguish a right of redemption, in which action the judgment, instead of directing a sale of the property, shall fix the time within which such property shall be redeemed by a person having or claiming the right to redeem or foreclose a second or subsequent mortgage or lien that has been matured for at least five years and shall provide that a failure to redeem or commence an action for the foreclosure of such mortgage or lien within such time, shall preclude such mortgagee or lienor from redeeming such property or foreclosing such mortgage or lien and thereafter such mortgagee or lienor shall be excluded from claiming any title or interest in such property and all title and interest of such mortgagee or lienor in such property shall thereby be extinguished and terminated."[25]

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pays the same debt twice? Loporto v. Druiss Co. 268 N. Y. 699 (1935), 269 N. Y. 677 (1936); Home Building & Loan Ass'n v. Blaisdell, 290 U. S. 398 (1934).

[24]Failure to comply strictly with the requirements of the statutes as to posting and publication of notice of sale may give the mortgagee who buys in the premises a defective title. Bechstein v. Schultz, 120 N. Y. 168 (1890); Pawlak v. Gruszecki, 124 Misc. 447 (Sup. Ct. 1925); City of Albany v. Goodman, 203 App. Div. 530 (3d Dept. 1922).

[25]C.P.A. § 1082. The suggestion has been made that strict foreclosure fell into disfavor because, out 'of tender regard for debtors, judges, would keep extending from one six-months' period to another the time within which the debtor might pay off the mortgage. Similar postponement of sales appears to have been not so readily obtainable. See 2 VAN SANTVOORD, A TREATISE ON THE PRACTICE IN THE SUPREME COURT OF THE STATE OF NEW YORK IN EQUITY ACTIONS AND SPECIAL PROCEEDINGS (2d ed. 1862) c. 2, p. 71.

The exact limits of the right to foreclose a right to redeem without sale under C.P.A. § 1082 are not entirely clear. This practice may be convenient where in an ordinary foreclosure and sale a defective title has been created because necessary

Foreclosure with sale was recognized and regulated by statute as early as 1760 in the Colony of New York. An act passed November 8 of that year[26] provided for service of process on absentee mortgagors by publication, and also regulated the subsequent proceedings in the action. If the defendant mortgagor failed to appear after the publication of an order for his appearance in a newspaper, and after posting for three Sundays at the defendant's parish church,

> ". . . then on proof made of the publication of such order in manner aforesaid the court may order the previous bill to be taken pro confeso and thereupon decree a sale of the mortgaged premises or any part or parts thereof as to the court shall seem just and right."

The statute provides for the appointment of two appraisers to inform the court as to the true value of the premises, and for a sale by the sheriff after advertisement in one or more newspapers once a week for six months. The statute directs the sheriff to make a deed of the premises to the purchaser, which will convey the same title as a deed made by the mortgagor and mortgagee.[27] Thus with minor differences, the present method of foreclosure and sale was in use (at least in cases of absentees) in New York a century and three quarters ago. It is noteworthy, however, that the form of the language providing for a sale is permissive and not mandatory, and strict foreclosure presumably existed as an alternative remedy.[28]

By an Act of December 24, 1767, the statute just described was continued in effect until 1780.[29] In 1785, the legislature of the new State enacted a similar statute, with the time of publication of the notice of sale shortened to six weeks.[30] In 1787, the requirement that two appraisers be appointed was dropped.[31] The statute recites the previous requirements, and continues:

> ". . . and whereas it is found by experience that in most cases the causing of the mortgaged premises to be appraised in manner aforesaid before any decree shall be made is attended with delay and considerable expense and no valuable purpose answered thereby; therefore BE IT ENACTED by the people of the State of New York . . . that it shall and may be lawful for the Chancellor to decree and order a sale of any such mortgaged premises in pursuance of said act without any such appraisal as aforesaid in such cases where he shall judge the same to be necessary; . . . "

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parties have been omitted. See WILTSIE, MORTGAGE FORECLOSURE (4th ed.) § 32; Benedict v. Gilman, 4 Paige Ch. 58 (N. Y. 1833); Kendall v. Treadwell, 14 How. Pr. 165 (N. Y. 1857).

[26]"An Act for making process in courts of equity effective against mortgagors who abscond and cannot be served therewith or who refuse to appear." 3 COLONIAL LAWS OF NEW YORK (Lyon, 1894) p. 494.

[27]See C.P.A. § 1085.

[28]See 2 VAN SANTVOORD, *op. cit. supra* note 25, c. 2, p. 71.

[29]3 COLONIAL LAWS OF NEW YORK (Lyon, 1894) p. 957.

[30]GREENLEAF, LAWS OF THE STATE OF NEW YORK (2d ed. 1798) c. 27, p. 157.

[31]*Id.* at 406.

The form of this act, like its predecessors, seems to authorize the Chancellor to order a sale or not, as he deems fit. Of course it would be difficult to determine the proportion of cases in which the court determined that a sale was unnecessary.

The enactments just referred to were all in terms directed only to cases of absentee defendants. In 1801, however, the Legislature, in a general statute regulating chancery practice,[32] provided for mortgage foreclosure sales by masters, although sales were not expressly made mandatory. In 1813, chancery practice was again revised and the statute of 1801 was reenacted with little change, and without expressly requiring a sale.[33]

The Revised Statutes of 1829[34] contain language which seems to empower the court to decree a sale as if this were an exception to the normal course.

> "Whenever a bill shall be filed for the foreclosure or satisfaction of a mortgage the court shall have power to decree a sale of the mortgaged premises or such part thereof as may be sufficient to discharge the amount due on the mortgage and the costs of suit."

On the other hand, Rule 135 of the Rules and Orders of the Court of Chancery, as revised by Chancellor Walworth in 1837 and 1840,[35] contains language

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[32]"An Act concerning the Court of Chancery and the Proceedings therein", passed April 3, 1801: 1 KENT & RADCLIFFE, LAWS OF NEW YORK c. 33, p. 439.

[33]1 VAN NESS AND WOODWORTH, REVISED LAWS OF NEW YORK (1813) p. 486.

[34]2 N. Y. REV. STAT. (1st ed. 1829) part III, c. 1, art. 6, § 151, p. 191: "Of the Powers and Proceedings of the Court upon Bills for the Foreclosure or Satisfaction of Mortgages."

[35]The financial crisis of 1837 and the readjustment that followed it produced some interesting experiments in New York foreclosure procedure. N. Y. Laws 1837, c. 410, passed May 12, gave to any mortgagor of real or leasehold estate one year from the date of sale under foreclosure to redeem by paying the judgment debt with interest at the rate of 10% per annum. Within a year of the date of this statute its inconvenience had become apparent, and it was repealed by N. Y. Laws 1838, c. 266, passed April 18 to take effect November 1, 1838.

By 1840 the advantages of facilitating liquidation had appeared, and on May 14 of that year the legislature passed N. Y. Laws 1840, c. 342, entitled "An Act to reduce the expense of foreclosing mortgages in the court of chancery." By this statute the Chancellor was directed to devise short forms for bills, the taxable costs were rigidly restricted, and calendar practice on defaults was eliminated. The complainant was directed to file with his bill a notice of pendency containing statements like those in use today. Then there occurred a provision cutting off the rights of inferior mortgagees and other lienors without their being made parties to the foreclosure:

> "§ 9. It shall not be necessary that any person having a lien by any judgment or decree upon the land contained in any mortgage subsequent to such mortgage, or any person having any lien or claim by or under such subsequent judgment or decree, be made a party to the suit for the foreclosure thereof; and every decree of foreclosure and sale of lands mortgaged, shall bar and foreclose all claim and equity of redemption of every person having such subsequent judgment or decree, and his heirs and personal representatives, and of all persons claiming under him or them, subject to the provisions of the subsequent sections of this act; but no such decree shall be made, unless proof shall be given in such manner as shall be required by the court, that notice of the pendency of the suit has been filed as is required in the next preceding section, for at least forty days before such decree shall be made."

The unhappy subsequent lienor was allowed to participate in any surplus moneys,

indicating that by that time sale had become the rule, although the court might dispense with it:

> ". . . and unless otherwise specially ordered by the court, the decree shall direct that the mortgaged premises, or so much thereof as may be sufficient to raise the amount due to the complainant for principal, interest and costs, and which may be sold separately without material injury to the parties interested, be sold by or under the direction of a master. . . ."[36]

The adoption of the Code of Procedure, which took effect in 1848, did not alter the procedure in foreclosures. Van Santvoord, writing of practice under the Code in 1862, said:[37]

> ". . . though the *strict foreclosure,* no doubt, still exists as an equitable remedy, if the parties choose to ask, or the court thinks proper to allow it, yet it is rarely resorted to in this State . . . the statutory remedy of a judgment for a sale of the mortgaged premises to satisfy the mortgage, and costs being almost invariably adopted."[38]

The enactment in 1880 of Part II of the Code of Civil Procedure for the first time made mandatory a judgment of sale in the ordinary mortgage foreclosure.[39] Section 1626 of the Code of Civil Procedure provided:

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even though not a party to the foreclosure.

Evidently the procedure was considered too harsh, for by an Act of May 14, 1844 (N. Y. Laws 1844, c. 346, § 5), the provision for cutting off subsequent lienors without joining them as parties was repealed. Probably by that time most of the defaulted mortgages of the 1837 depression had been foreclosed.

[36]*Cf.* N. Y. CIV. PRAC. RULE 259.

[37]2 Van Santvoörd, *op. cit. supra* note 25, c. 2, p. 71.

[38]Kendall v. Treadwell, 14 How. Pr. 165 (N. Y. 1857), is an interesting example of the use of strict foreclosure to correct defects in a previous foreclosure and sale. The plaintiff mortgagee had bought in the land in a County Court foreclosure sale, and had made repairs and improvements. The decision of the General Term in Hall v. Nelson, 14 How. Pr. 32 (N. Y. 1856) threw doubt on the jurisdiction of the County Court, and thereupon the plaintiff brought this action for strict foreclosure. No defendant appeared, but the Court wrote a studied opinion stating that such foreclosures would probably be numerous and that the form of judgment to be entered should therefore be considered with care. The opinion required that the judgment provide that, unless some defendant gave the plantiff notice of intention and an agreement to redeem within ten days after judgment, all defendants should be barred and foreclosed and the plaintiff should have the mortgaged premises in full payment of the debt. If any defendant should give such notice and pay to the plaintiff the debt, costs, and the value of the improvements, then the premises should be sold and the proceeds should be distributed among the subsequent lienors according to their priorities.

The procedure outlined in that judgment is interestingly similar to that suggested in this paper as desirable today. In each the premises are strictly foreclosed without sale unless some defendant takes timely steps to procure a sale and to protect the plaintiff against its costs. The practice in the Kendall case is harder on the defendant. There, to procure a sale, he has to pay the mortgage debt and costs; while this paper suggests only that he be required to post a bond to secure to the plaintiff the expense of sale and damages because of the delay. In both procedures the debt is satisfied if the plaintiff is awarded the premises by strict foreclosure. Similarly in Benedict v. Gilman, 4 Paige Ch. 58 (N. Y. 1833), the opinion directed that, in case the redemption period of thirty days passed and the plaintiff acquired absolute title to the land, he was to have no costs against the defendants.

[39]N. Y. Laws 1880, c. 178.

> "In an action to foreclose a mortgage upon real property, if the plaintiff becomes entitled to final judgment, it must direct the sale of the property mortgaged or of such part thereof as is sufficient to discharge the mortgage debt, the expenses of the sale and the costs of the action."

This is the language of the first clause of Section 1082 of the present Civil Practice Act, which today requires a sale in every mortgage foreclosure except in the rare case of a foreclosure to extinguish a right of redemption.

III

England has never gone as far as New York in requiring a sale in every ordinary foreclosure action. The practice there permits the court to order a sale or grant strict foreclosure as appears necessary or expedient.[40] The discretion given to the court to order a sale instead of strict foreclosure must be exercised judicially,[41] and the court may require appropriate security to be posted to cover the cost of sale.[42]

Of course, it is difficult for a New York lawyer to get the feeling of the English practice. While it affords the principal advantage of the procedure suggested for New York by eliminating the sale entirely when that course appears necessary or expedient, it appears to open the door to disputes of some length as to what is necessary or expedient in a given case. The practice here suggested eliminates the uncertainty, for the mortgagee would have an absolute right to strict foreclosure unless a defendant demanded a sale and posted security or had it dispensed with, in which event the defendant's right to sale would be absolute.

IV

One of the commonest criticisms directed at the law and lawyers is that they are both continuously out of date. There is a measure of truth in this criticism as applied to our law of mortgages; and there is good reason to question whether a practice developed in an era when a great portion of our population lived in large families on farm homesteads is appropriate to a time of transient ownership of small dwellings on subdivision lots, when the owner's ability to get a "bank loan" on his house is a necessary prerequisite to ownership. No favor is done the house owner by putting unnecessary difficulty

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[40]WILSON, PRACTICE OF THE SUPREME COURT OF JUDICATURE (7th ed. 1888) p. 382; 21 HALSBURY, LAWS OF ENGLAND (1912) p. 284.

[41]Merchant Banking Co. v. London and Hanseatic Bank, 55 L. J. Ch. 479, 480 (1886).

[42]Wooley v. Colman, 21 Ch. D. 169 (1882). Here the plaintiff was required to secure the costs although the defendants had asked the sale to protect their interests. It appears more sensible to require the party who is asking the sale because he supposes that the land has surplus value, to give security to pay for the trouble he has caused in case at the sale no bid is made sufficient to pay the claims of the plaintiff and the costs of sale.

in the way of the lender who wants to foreclose his mortgage: it only increases the cost of carrying the loan and makes refinancing harder.

The legislation suggested in this paper would merely permit the interest of the owner to be foreclosed in the same way now available for cutting off rights of redemption, which may well be quite as valuable as the owner's equity. This would be a business-like improvement in our law.

APPENDIX[43]

Suggested Amendments to New York Civil Practice Act

Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

§ 1077E. Application to Pending Actions. . . . If such action or proceeding has not proceeded to final judgment [directing the sale of the mortgaged premises] then such action shall be dismissed . . .

§ 1079B. (New Section.) *Demand for Sale and Security. In any action to foreclose a mortgage upon real property any party in his pleading may demand that the judgment of foreclosure require a sale of the mortgaged premises; provided that no such demand on a defendant's behalf shall be of any effect unless such defendant before serving his pleading shall file with the Clerk his bond with two sufficient sureties in the sum of $250.00, conditioned for the payment of the costs, fees and expenses of advertisement and sale and any damage the plaintiff may suffer by reason of the delay incidental thereto in case the proceeds on the sale shall be insufficient to equal the sum of the amount owing by the party liable as determined by the judgment, with interest, plus the amount owing on all prior liens and encumbrances with interest, plus costs and disbursements of the action including the referee's fees and disbursements. Such defendant shall serve a copy of his bond with his pleading. The court shall have power by order, made upon notice, to dispense with such security in the case of an infant, an incompetent, or a poor person as defined in § 199 of the Civil Practice Act, upon a showing to the satisfaction of the court that there is reasonable ground to believe that bids will be made on the sale equal to or in excess of the sum needed as defined in this section. The court upon a proper showing shall have power to require a bond in excess of $250.00.*

§ 1080. Notice of pendency of action to be filed. The plaintiff, at least twenty days before a final judgment [directing a sale] is rendered, must file in the clerk's office . . .

§ 1081. When complaint to be dismissed on payment of sum due. . . . upon the defendant paying into court, at any time before a final judgment [directing a sale] is rendered, the sum due and the plaintiff's costs.

§ 1082. Final judgment [must direct sale]. In an action to foreclose a mortgage upon real property, if the plaintiff becomes entitled to final judgment, [it] *in case a sale has been demanded in the pleadings and security posted where required or dispensed with as provided in § 1079B, the judgment* must direct the sale. . . . In case of the death, disability, or removal of

[43]In drawing the suggested amendments to the Civil Practice Act and Rules, every effort has been made to make the judgment of foreclosure without sale the practical equivalent of the present referee's deed. Hence provision is made for including in such a judgment the essential features of such a conveyance.

the officer appointed to conduct the sale of the premises, the court may grant an order authorizing the bank or trust company in which such surplus moneys are deposited to pay them over to the person or persons entitled thereto.

In case no party has become entitled to require a sale by demand and by posting security when required, the final judgment shall provide that the interests of all defendants having interests in the mortgaged premises subsequent to the mortgage under foreclosure, who shall be named in said judgment or sufficiently described therein if their names be unknown, shall thereby be extinguished and terminated, and that the indebtedness secured by the mortgage shall be deemed entirely satisfied and discharged. Every such judgment of foreclosure without sale shall be recorded in the same manner as a deed and indexed in the name of the last record owner as grantor and in the name of the plaintiff as grantee.

§ 1083A. Limitation upon deficiency judgments [during emergency period]. No judgment shall be granted for any residue of the debt remaining unsatisfied as prescribed by the preceding section [where an action to foreclose the mortgage has been or shall be commenced during the emergency or where the mortgaged property shall be sold during the emergency] except as herein provided. . . .

§ 1086. Sale where mortgage debt is not all due. Where the mortgage debt is not all due . . . the final judgment *if it direct a sale,* must direct. . . . The plaintiff may apply . . . as often as a default happens. If it appears that the mortgaged property is so circumstanced that a sale of the whole will be most beneficial to the parties, *in case a sale has been demanded in the pleadings and security posted where required or dispensed with as provided in § 1079B,* the final judgment may direct. . . .

Suggested Amendments to Rules of Civil Practice

Rule 256. Reference on default or admission. If, in an action to foreclose a mortgage *any defendant be an infant, an incompetent, or an absentee* [the defendant fail to answer within the time allowed for that purpose, or the right of the plaintiff, as stated in the complaint, is admitted by the answer] unless the court shall ascertain and determine the amount due, the plaintiff may have an order referring it to some suitable person. . . . . and to compute the amount due on the mortgage preparatory to the application for judgment [of foreclosure and sale].

Rule 259. Contents of judgment *in foreclosure action* [of sale]. In every judgment for the sale *or foreclosure without sale* of mortgaged premises, the description and particular boundaries of the property to be sold *or foreclosed without sale,* so far as the same can be ascertained . . . shall be inserted. *Where the judgment directs a sale, it shall,* unless otherwise specially ordered by the court [the judgment shall] direct that the mortgaged premises . . . .

Rule 266. Mortgage and assignments to be filed or recorded before conveyance *or judgment of foreclosure without sale.* Whenever a sheriff or referee sells mortgaged premises under a decree, order, or judgment of the court, *or whenever a judgment of foreclosure without sale is entered* it shall be the duty of the plaintiff *before the entry of the judgment of foreclosure without sale or* before a deed is executed to the purchaser, to file such mortgage . . . in the county or counties where the lands so sold *or foreclosed without sale* are situated before a deed is executed to the purchaser on the sale *or before the judgment of foreclosure without sale is entered;* . . .