THE MYTH OF STRICT FORECLOSURE

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Myths in the field of mortgages are many and striking. One of the most striking is the assumption of American students that the English chancellor left the mortgagor virtually unprotected from his mortgagee. It is not difficult to find the reasons for this assumption. In the colonial period of the country the Court of Chancery was in great disrepute. Time has removed much of the prejudice against doctrines of the chancellor, but in the field of mortgages the prejudice has continued. First, the English system of mortgages seems very primitive to American students. The struggle of junior mortgages to obtain the status of legal charges has confirmed the tradition that the English system of mortgages was very slow in developing, and the hocus-pocus of the long-term lease by which, under the 1925 legislation, the second mortgage emerged as a legal charge tended to confirm the prejudice. Surely under a system so primitive mortgagors could not have been adequately protected!

The second reason for the prejudice is based upon the history of the American law of mortgages. For more than a century the trend of the American law has been toward greater protection for the debtor. Judges and legislators have joined in the effort to improve the position of the mortgagor and yet, as the débâcle of the last decade shows, the present American system leaves the mortgagor without adequate protection. The position of mortgagors who did not have the benefit of the century’s improvements must have been miserable indeed.

But plausible though the argument is, it is unsound. As Professor Maitland told his students at Cambridge, it is not safe to rely upon the form of the English mortgage for it is “one long suppressio veri and suggestio falsi.”

The unsoundness of the argument is apparent if one considers the developments in the English mortgage law during the past century and

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2 Law of Property Act (1925), 15 Geo. V, c. 20, §§ 85, 86.

3 Maitland, Lectures on Equity 269 (1909).
the present position of English mortgagors. The last century brought many changes designed to enlarge rather than to curb the powers of mortgagees and yet the books are not full of instances of the overreaching of mortgagees. Even though the political power in England has passed more and more from the moneyed classes the English legislation continues to be designed to increase rather than to curb the powers of mortgagees. England has had its economic "crisis" and has come through the period without a foreclosure crisis and without a demand for legislation to relieve mortgagors, even though there were modern English precedents for moratoria legislation. Moreover, the maturity of English mortgages continues to be fixed as a matter of course at six months from the date of execution. Today, as for at least a century, practically every English mortgage (except of course those executed within the preceding six months) is in default and can be foreclosed if the holder so elects. If the English mortgagor were not reasonably protected against overreaching it is unthinkable that he should have acquiesced for more than a century in the practice of fixing maturity at six months.

The thesis of this essay is that English mortgagors at the beginning of the nineteenth century were better protected against overreaching than under the system which has been developed in the most liberal American institution. It is proposed, first, to consider the remedies available to the English mortgagee at the beginning of the nineteenth century, and to sketch the developments of those institutions down to the present; secondly, to sketch the remedies of American mortgagees; and finally on the basis of this comparison to venture suggestions for changes in the American law of mortgages which can be made without unduly restricting mortgagees, and which should be made if mortgagors are to be adequately protected.

FORECLOSURE

American students are familiar with the history of the remedy of foreclosure which the English chancellor developed to relieve mortgagees

4 See Increase of Rent and Mortgage Interest (Restrictions) Act (1920), 10 & 11 Geo. V, c. 17.
5 2 Davidson, Precedents and Forms in Conveyancing pt. 2, 564 (3d ed. 1869).
6 The history of approved investments for trust funds may shed light upon the position of the English mortgagee. Before 1785 a real estate mortgage was deemed a proper security for the investment of trust funds. In *Ex parte Cathorpe*, 1 Cox Eq. 182 (1785), Lord Thurlow struck the real estate mortgage off the approved list and limited trustees to investment in consols. This continued to be the rule until 1859 when Parliament restored the real estate mortgage to the approved list. Law of Property and Trustees Relief Amendment (1859), 22 & 23 Vict., c. 33, § 32. *Quaere* do these rules reflect changes in the position of mortgagees, or merely the desire of the chancellor to support the market for consols?
after the development of the equity of redemption. Americans commonly assume, however, that foreclosure was a harsh and inequitable weapon which enabled mortgagees to take advantage of luckless mortgagors. Their reaction to the institution is indicated by the epithet which was used in America to describe the institution of foreclosure without a sale—namely, *strict* foreclosure. Under the English practice the contrast is between “foreclosure” and “sale in lieu of foreclosure,” not between “strict foreclosure” and “foreclosure by sale” as in America. The reason for the English usage is that foreclosure was not in any sense “strict.” The chancellor had been so zealous in his efforts to protect mortgagors and had devised so many safeguards for mortgagors that the remedy of foreclosure did not really foreclose. In England, therefore, the demand for reform in foreclosures came from *mortgagees*, not *mortgagors*; the changes which were made by the courts and Parliament in the English law of foreclosure during the nineteenth century were designed to relieve *mortgagees* and not *mortgagors*.

In the first place like other proceedings in chancery at this period a foreclosure was a slow and costly proceeding. But delays not common to chancery proceedings in general were a matter of course in foreclosures. The chancellor, having determined that the right of the mortgagor to redeem could not be barred by stipulations in the mortgage, was equally determined that it should not be barred by a decree in chancery until every opportunity had been given the mortgagor to protect his interest in the property. When, therefore, after the lapse of many months, the mortgagee had finally obtained a decree of foreclosure *nisi*, the proceeding was far from concluded. The matter was then referred to a master for an accounting. After the master had computed the balance due for principal, interest and costs, the mortgagor was allowed, as a matter of course, six months more in which to redeem. If, however, there were junior incumbrances upon the property it was customary to provide for additional successive redemption periods of three to six months for each of the junior

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8 42 C. J., Mortgages § 1509, n. 53 (1927). The term “strict foreclosure” was used by Chancellor Kent in Perine v. Dunn, 4 Johns. Ch. (N.Y.) 140, 143 (1819). See also 4 Kent, Commentaries § 181 (14th ed. 1896).

9 For the English usage see 2 Coote, Mortgages 1049 (9th ed. 1927).


11 For the typical decree for foreclosure *nisi* see Seton, Decrees 139 (1830).
incumbrances. Moreover so careful was the chancellor to protect the 
mortgagor's interest that, upon a slight showing, he would extend the 
time within which the mortgagor might redeem. In Edward v. Cunliffe which is frequently cited to illustrate this practice, the mortgagor obtained four separate extensions—the last one being granted even though the court had previously announced that the mortgagor had obtained his final indulgence. The result was that the mortgagor was allowed a period of twenty-four months after the date of the decree nisi within which to redeem the property.

Even after the final extension had expired the right to redeem continued until the mortgagee obtained a second decree—a decree of foreclosure absolute. By this decree the court declared that the mortgagor, having failed to exercise his right of redemption, was "absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption of, in and to the said mortgaged hereditaments." Final, conclusive and decisive as this action appeared nevertheless the mortgagee was not yet in a position to enjoy the property.

In the first place, the chancellor refused to take steps to put the mortgagee into possession; an action of ejectment was deemed adequate and the mortgagee had to resort to that unless the mortgagor or his tenant voluntarily surrendered possession upon demand.

Secondly, even though the foreclosure decree was in name and in terms absolute the title of the mortgagee was not entirely free from the claim of the mortgagor. The solicitude of the chancellor for the mortgagor did not, in spite of the formal finality of a decree absolute, end with the granting of such a decree. Even after that decree was enrolled the proceedings might be reopened and the mortgagor given another accounting and another opportunity to redeem.

2 Id. at 157 and nn. 161 et seq.; 2 Spence, Equitable Jurisdiction 687 (1850). Under the modern English practice only one redemption period is allowed; see Fisher and Lightwood, Law of Mortgage 779 (7th ed. 1931).

3 Ismoord v. Claypool, 1 Rep. Ch. 262 (1666-67) (extension granted without conditions); Anonymous, Barn. Ch. 221 (1740); Eyre v. Hanson, 2 Beav. 478 (1842) (on condition of payment of amount reported due for interest and costs); Holford v. Yate, 1 K. & J. 677 (1855) (on condition of payment of portion of interest in arrears). But some reason (though not a strong one) must be shown. Nanny v. Edwards, 4 Russ. 124 (1827). For Lord Eldon's opinion of the undesirable consequences of the practice see Novosielski v. Wakefield, 17 Ves. Jr. 417, 418 (1821) and 2 Maddock, Chancery Practice 492 (4th Am. ed. 1832).

4 1 Madd. 287 (1816).

5 Senhouse v. Earl, 2 Ves. Sr. 450 (1752).

6 Seton, Decrees 143 (1830).

7 Id. at 140, citing Sutton v. Stone, 2 Atk. 101 (1740).

8 Burgh v. Langton, 5 Br. F. C. 213, 15 Vin. Abr. 476, 2 Eq. Cas. Abr. 609 (1724) (decree absolute opened after sixteen years); Jones v. Creswicke, 9 Sim. 304 (1839) and cases reported
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So great was the protection accorded the mortgagor that a decree might be reopened not only against the mortgagee, but also as against a purchaser from the mortgagee. Consequently the mortgagee could not safely contract to convey an unencumbered estate since a title based upon a foreclosure might be upset by the chancellor upon application of the mortgagor. His title, therefore, was not marketable until a considerable period of time after the foreclosure and would not be forced upon a purchaser in a suit for specific performance. It was for this reason that in a later period, after powers of sale had been upheld, mortgagees who had obtained a decree of foreclosure absolute frequently found it desirable to exercise a power of sale in order to carry through a sale of the premises even though the exercise of the power opened the foreclosure.

Foreclosure was, then, not only slow, cumbersome, and costly; it foreclosed imperfectly. It is not surprising, therefore, that mortgagees should attempt to obtain substitutes for foreclosure as a means of barring the mortgagor's interest in the security. One method that was designed to relieve mortgagees was the same method which in American jurisdictions has been all but universally adopted to protect mortgagors from the harshness of "strict" foreclosure. This was a sale before a master of the therein. In some Canadian cases foreclosure decrees have been opened even after a "Torrens Act" certificate of title has been issued: Falconbridge, Mortgages 418 (2d ed. 1931). Upon opening a foreclosure the usual standards for taking accounts against a mortgagee in possession were sometimes relaxed. Williams v. Box, 24 Manitoba 31 (1913). Cf. Parkinson v. Hanbury, L.R. 2 H.L. 1 (1867) (one in possession under purchase based upon a defective exercise of power of sale was not required to account as a mortgagee in possession); Anchor Trust Co. v. Bell, [1926] Ch. 805, 826.

19 Campbell v. Holyland, 7 Ch. D. 166 (1876). Because of this rule Prof. Maitland advised his students at Cambridge that "one is not very safe in purchasing a foreclosed estate, and owing to this meddlesome equity foreclosure is not a procedure upon which prudent mortgagees will place much of their reliance." Maitland, Lectures on Equity 273 (1920).

20 A case precisely in point has not been found. This would seem to follow from Campbell v. Holyland, 7 Ch. D. 166 (1876). See 1 Dart, Vendors and Purchasers 412 (8th ed. 1929). Compare the contrary opinion of Coventry which was based upon the assumption that a foreclosure decree would not be reopened as against a purchaser. 2 Powell, Mortgages 1002, 1006, n. 1 (6th ed. 1826); In re Power and Carton's Contract, 25 Ch. D. (Ir.) 459 (1890) (where under special circumstances a purchaser was required to accept a title based on a foreclosure); Watson v. Marston, 4 DeG. M. & G. 230 (1853) (where a purchaser who expected a title based upon the exercise of a power of sale was not required to accept a title based upon a foreclosure). In some cases mortgagees who had foreclosed attempted to avoid the possibility that the decree would be re-opened by obtaining a transfer of the equity of redemption. See 1 Powell, Mortgages 306, n. F (6th ed. 1828). Compare the Illinois "quick redemption" practice described in Katz, Protection of Minority Bondholders, 3 Univ. Chi. L. Rev. 517, 541 (1936).

court in lieu of a decree of foreclosure absolute. A sale by the court was, from the point of view of the mortgagee, much superior to a foreclosure. In the first place the sale would not normally be postponed at the request of the mortgagor. Secondly, though the chancellor would refuse confirmation of a sale if the bid were advanced, once a sale had been confirmed the successful purchaser would obtain an indefeasible title and the mortgagor would be limited to the surplus, if any, which remained after the account for principal, interest and costs had been satisfied out of the purchase price. If the price obtained was less than the amount due, the mortgagee enjoyed the additional advantage of being able to get a judgment at law for the deficiency without opening the foreclosure. From these points of view a sale in lieu of foreclosure, then, was much superior to foreclosure. But under the practice of the early nineteenth century a sale in lieu of foreclosure was not granted as a matter of course. In a few special cases such relief was sometimes given, but in the ordinary case the mortgagee had to be content with the inconvenient and inefficient remedy of foreclosure. Not until Parliament came to the assistance of mortgagees in 1852 could the English mortgagee generally obtain a decree of sale in lieu of foreclosure. It should be noted, however, that even in those cases in which a sale was ordered the mortgagee was not, save in the most unusual case, permitted to purchase at the sale. The mortgagee could not, then, get the property for a price which he was willing to bid; and a sale was not sought, therefore, by a mortgagee unless he was willing to let the property go for a price obtainable from third parties.

Another substitute for a suit to foreclose was the exercise of a power of sale. In pursuance of authority given in the mortgage deed the mortgagee sold the property free from the interest of the mortgagor, applied the

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22 For the earlier English practice see Coote, Mortgages 493 (3d ed. 1850); 42 C. J., Mortgages § 1511, n. 92 (1927); Lansing v. Goelet, 9 Cowen 346, 370 ff. (1827).
24 See 2 Daniell, Chancery Practice 1208 (2d ed. 1845); Sugden, Vendors and Purchasers 59 (8th ed. 1830); 2 Dart, Vendor and Purchaser 988 (8th ed. 1929). The practice of opening biddings was abolished by The Sale of Land by Auction Act 1867, 30 & 31 Vict., c. 48 § 7.
26 See note 64 infra.
27 Coote, Mortgages 493 (3d ed. 1850); 42 C. J., Mortgages § 1511, n. 92 (1927); Adams, Equity 120 (3d Am. ed. 1855); Lansing v. Goelet, 9 Cowen (N.Y.) 346, 370 ff. (1827).
28 Chancery Procedure Amendment Act, 15 & 16 Vict., c. 86, § 48 (1852) replaced by Conveyancing and Law of Property Act, 44 & 45 Vict., c. 41, § 25 (2) (1881) which has now been replaced by Law of Property Act, (1925) 15 Geo. V, c. 20, § 91 (2).
proceeds of the sale upon the obligation, and paid over the surplus, if any, to the mortgagor. The power was very broad since the success of the plan depended upon the ability to give a purchaser at the sale a title free from the mortgagor's equity of redemption.

At first it was thought by many that such a power would fall necessarily within the ban of the chancellor against clogs on the right of redemption. Early in the nineteenth century, however, the power of sale was upheld and by the middle of the century had become a power customarily inserted in an English mortgage.

The advantages to mortgagees of the exercise of the power of sale were many. It was simple and inexpensive. By a sale under the power the mortgagor's right of redemption could be barred in short order. If the price obtained was less than the amount due on the obligation, the mortgagee could get a judgment for the deficiency without reopening the foreclosure. But under no circumstances could the mortgagee, by exercising the power of sale, obtain the property for himself free from the right of the mortgagor to redeem. Consequently it was to the interest of the mortgagee as well as the mortgagor that the sale be so conducted that third persons would bid for the property. The mortgagee would really seek to interest third persons in the property; wide publicity would be given to the sale so that prospective purchasers would be attracted. Until a satisfactory sale could be negotiated the power would not be exercised, and the mortgagee would either wait or resort to a foreclosure action.

The power of sale worked so well in practice that by Acts of Parliament an extensive statutory power of sale is now implied in the usual English mortgage form.

The question is considered doubtful in 1 Powell, Mortgages 13 ff. (4th ed. 1799) and a power of sale is not included in the mortgage form recommended in the fourth edition of Powell.

In the sixth edition of Powell, Coventry refers to the power of sale as a modern development. 2 Powell, Mortgages 961, n. A (6th ed. 1828). He includes in his precedents a form for a power of sale. 3 Powell, Mortgages 1111 (Rand's 1828 ed.). See also 1 Powell, Mortgages 12a, n. K (6th ed. 1828); Corder v. Morgan, 18 Ves. Jr. 344 (1811).

31 See 1 Coote, Mortgages 128 (1st ed. 1821) (where the former doubts are discussed and dismissed as groundless. A power of sale was not, however, included in the form suggested in the first edition of Coote). In Clark v. The Royal Panopticon, 4 Drew. 26, 30 (1857), the Vice Chancellor said that the practice of including a power of sale was not universal.

32 Maitland, Lectures on Equity 278 (1909); Farrar v. Farrars Ltd., 40 Ch. D. 395 (1888); Waring (Lord) v. London and Manchester Assurance Co., [1935] 1 Ch. 310 (bona fide contract); see 2 Coote, Mortgages 931 (9th ed. 1927).

33 Rudge v. Richens, L. R. 3 C. P. 358 (1873).

34 2 Coote, Mortgages 934 (9th ed. 1927). Robertson v. Norris, 1 Giff. 421 (1858) (mortgagor permitted to redeem fifteen years after such sale); Martinson v. Clowes, 21 Ch. D. 857 (1852) (even though no proof of inadequacy of price).
Today the exercise of a power of sale has all but supplanted an action for foreclosure as the means of barring the mortgagor's interest in the security.\textsuperscript{35}

\textbf{RENTS AND PROFITS}

Under the traditional English mortgage the mortgagee was entitled \textit{(qua mortgagee)} to possession and to the rents and profits to be derived from the security.\textsuperscript{37} When, however, the mortgagee of the nineteenth century had occasion to obtain either possession or rents and profits pend- ing foreclosure he encountered many difficulties. Even though it was conceded that the mortgagee might pursue his remedies concurrently, and in spite of the maxim that when equity assumed jurisdiction it would give full and complete relief, the chancellor would not aid the mortgagee to obtain possession or rents and profits either before or after a foreclosure decree. A writ of assistance was not available either before or, as has been shown, after the decree.\textsuperscript{38} The mortgagor in possession was not required to account for the benefits derived from possession during the foreclosure suit,\textsuperscript{39} nor would the chancellor appoint a receiver to sequestrate the rents and profits for the benefit of a mortgagee.\textsuperscript{40} The reason given for each of these conclusions was that the legal remedies of the mortgagee were adequate.

When one examines the remedies of the mortgagee at law in the light of the rules applied by the chancellor to mortgagees who pursued their legal remedies the adequacy appears "Pickwickian" and one is tempted to conclude that mortgagees were left to their legal remedies, even though inadequate, because the chancellor did not want mortgagors to be disturbed in the enjoyment of the security. True, the mortgagee might, even during the pendency of the suit for foreclosure, maintain ejectment against the mortgagor or tenants of the mortgagor whose leases were subordinate to the mortgage.\textsuperscript{41} Ejectment, however, though it led to specific relief,

\textsuperscript{35}Law of Property Act (1925), 15 Geo. V, c. 20, § 101 (1) (i), replacing Conveyancing Act (1881), 44 & 45 Vict., c. 41, § 19 (2); see also Lord Cranworth's Act (1869) 23 & 24 Vict., c. 145.


\textsuperscript{37}Keech v. Hall, 1 Doug. 21 (1778); Moss v. Gallimore, 1 Doug. 279 (1779).

\textsuperscript{38}Seton, Decrees 140 (1830), citing Sutton v. Stone, 2 Atk. 100 (1740). An order for possession is now obtainable. Keith v. Day, L. R. 39 Ch. D. 452 (1888).

\textsuperscript{39}Colman v. Duke of St. Albans, 3 Ves. Jr. 25 (1756) (even though the security was inadequate).

\textsuperscript{40}Berney v. Sewell, 1 J.&W. 647 (1820); Ackland v. Gravener, 31 Beav. 482 (1862). Under §25 (8) of the Judicature Act, (1873) 36 & 37 Vict., c. 66, a receiver may be appointed at the request of a legal mortgagee. See Tillett v. Nixon, L. R. 25 Ch. D. 238 (1883).

\textsuperscript{41}Lockhart v. Hardy, 9 Beav. 349 (1846); Booth v. Booth, 2 Atk. 342 (1742).
was not satisfactory. It was not a summary remedy. Even though notice was not a condition precedent to the institution of the action, a considerable period of time would expire before the mortgagee could obtain possession. During this period the mortgagor enjoyed the fruits of possession subject only to personal liability for mesne profits, a liability which would not presumably net the mortgagee twenty shillings in the pound since foreclosures would not be normally instituted against solvent mortgagors.

The legal remedies of the mortgagee were inadequate also because the mortgagee could not collect rents due from the mortgagor's tenants under leases which were subordinate to the mortgage. The demand of the mortgagee was treated as the assertion of a paramount title and an action for rent under such leases would fail for want of privity of estate.

Consequently the mortgagee who pursued his legal remedies had either to operate the property, to find new tenants for the property, or to negotiate new leases with the old tenants. The task of management which confronted the mortgagee who had asserted his right to possession was not merely one which he might find inconvenient or irksome but one which might result in serious financial liability. Upon mortgagees in possession the chancellor imposed the duty of managing the premises—not merely as they did their own affairs but according to the high standards of the chancellor—standards which were in many respects comparable to those imposed upon trustees. The mortgagee in possession was required to account not merely for the profits that he got from the premises, but for what he might have got from the premises. The assumption of this liability was attended with much risk. The mortgagee in possession acted at his peril since he did not have, as did trustees, the benefit of a bill for instructions. Furthermore the task of management was unusually difficult. All leases subordinate had been terminated; new arrangements had to be made for

42 Doe v. Maisey, 8 B.&C. 767 (1828); Doe v. Giles, 5 Bing. 421 (1829).
43 Under the specimen forms in Runnington, Ejectment 477, app. II, VI (1st Am. ed. 1806) eight months elapsed; in re Doe d. Basto v. Cox, L.J. 17 (Q.B.) (n.s.) 3 (1847), possession was obtained in about eleven months. In Warren, Ten Thousand a Year, the villain obtained possession in a few days less than five months (but the hero would not authorize his counsel to use dilatory tactics).
44 Evans v. Elliot, 9 Ad. & E. 342 (1838). This rule has been partially repealed by statute. See Law of Property Act, (1925) 15 & 16 Geo. V, c. 20, § 99.
45 2 Coote, Mortgages 828 ff., esp. 829, n. h (9th ed. 1927); 2 Davidson, Precedents and Forms in Conveyancing, pt. II, 822 (3d ed. 1869).
47 See note 37 supra.
the entire premises under difficult circumstances, since the mortgagee could not create a lease binding on the mortgagor. Furthermore the property would require a great deal of attention, since it would usually be in a run-down condition as a result of the attempt of the hard-pressed mortgagor to maintain it with a minimum of expense. The mortgagee, however, was not given any allowance to compensate for the time which he spent in managing the property even though he had expressly stipulated for such an allowance. He could not avoid the responsibility of management by delegating it to an agent or a receiver. Having taken possession he could not, if he found the task of management more difficult than he had thought, avoid further liability by surrendering possession to the mortgagor. If he transferred the mortgage and possession of the property to a third person he was accountible for the management of his successor as well as for his own. Upon him rested the duty of management and the liability to account for his management until such time as the mortgagor's right to redeem should be finally barred.

Moreover the possession of the mortgagee frequently complicated and delayed the foreclosure. The possession made the taking of accounts before the master more complicated. Furthermore the receipt of rent after the master had reported and before the date appointed for redemption necessitated a new accounting and automatically enlarged the time within which the mortgagor might redeem. Because of these difficulties the English conveyancers refused to acquiesce in the opinion of the chancellor that the mortgagee's legal remedies were adequate and warned their clients and readers that only in the most unusual circumstances

48 Hungerford v. Clay, 9 Mod. 1 (1722) (unless in case of necessity). This difficulty has been remedied by § 18 of the Conveyancing Act, (1882) 44 & 45 Vict., c. 41, now replaced by § 99 of the Law of Property Act, 15 & 16 Geo. V, c. 20 (1925).

49 Chambers v. Goodwin, 9 Ves. Jr. 254 (1804); Broad v. Selfe, 9 Jur. (n.s.) Ex. 885 (1863); French v. Baron, 2 Atk. 120 (1740); Barrett v. Hartley, L.R. 2 Eq. 789 (1866); compare, however, 23 Halsbury, Laws of England, Mortgages 417 (2d ed. 1926).


51 See note I, 1 Eq. Cas. Abr. 328 (1792); Venables v. Foyle, 1 Ch. C. 3 (1660). As was pointed out in Davidson, 2 Precedents & Forms in Conveyancing, pt. II, 823 (3d ed. 1869), unless consent of the mortgagor could be obtained a mortgagee in possession would find it almost impossible to transfer his interest because of the difficulty of stating the account without the concurrence of the mortgagor. Macclesfield v. Fitton, 1 Vern. 168 (1683).

52 Garlick v. Jackson, 4 Beav. 154 (1841); Buchanan v. Greenway, 12 Beav. 355 (1849) (receipt of less than £ 7 of rents entitled mortgagor to a new account and an extension not to exceed three months). Compare receipt of rent after redemption date, but before decree absolute entered: National Permanent Mutual Benefit Building Society v. Raper, [1892] 1 Ch. D. 54.
should mortgagees assert their right to possession during a foreclos-
ure.53

In the course of the nineteenth century a conveyancing device was
developed to enable mortgagees to collect rents during foreclosure without
incurring the risks and responsibilities of a mortgagee in possession. This
was the inclusion in the transaction of a power upon the mortgagor’s de-
fault in the payment of interest to appoint a receiver to collect rents and
apply them on the interest due.54 The receiver, though appointed by the
mortgagee, was deemed the agent of the mortgagor, and the mortgagee
was not liable for his defaults or held accountable as a mortgagee in
possession.55 This device had the further advantage to the mortgagee in
that by it he could obtain the benefit of leases which were subordinate to
the lien of the mortgage.56 It should be noted that, though it enabled the
mortgagee to reach rents for the purpose of keeping down the interest, it
did not overthrow the arrangements which the mortgagor had made, and
did not, therefore, subject mortgagors to liability to their tenants. It
merely insured that whatever profits were derived from the premises
would be applied to reduce the interest charges on the mortgage and
would not be diverted to other purposes; it did not, as did the entry by the
mortgagee work havoc with the affairs of the mortgagor and was not,
therefore, set aside by the chancellor as were various stipulations designed
to relieve mortgagees in possession of the burdens of management and the
duty to account. This device, as did the power of sale, obtained the
sanction of Parliament and is now a statutory power available to English
mortgagees.57

DEFICIENCY

The chancellor did not afford the mortgagee a practical method of
reaching unmortgaged assets. Here also the extreme solicitude of the
chancellor for the mortgagor is apparent. At one time it was thought

53 2 Davidson, Precedents and Forms in Conveyancing, pt. II, 638 (3d ed. 1869): “The
situation of a mortgagee in possession is far from an eligible one. On the principle that a
mortgagee must make no advantage out of his mortgage beyond the payment of principal,
interest and costs, he is bound to account upon terms of greatest strictness.” 3 Bythewood
and Jarman, Conveyancing 905 (4th ed. 1886): “But, with all the care that can be taken, the
situation of a mortgagee in possession is not to be coveted.” See also 7 Holdsworth, History
of English Law 375 (1926); Maitland, Lectures on Equity 274 (1909); 2 Coote, Mortgages 828
(9th ed. 1927); Hanbury, Equity 413, cf. 416 (1935); Mortgagees in Possession, 106 L. T. 407
(1899).

54 2 Davidson, Precedents and Forms in Conveyancing, pt. II, 642 (3d ed. 1868).
55 Ibid.
56 Ibid.
57 Conveyancing and Law of Property Act (1881), 44 & 45 Vict., c. 41, § 19 (iii), now super-
that the foreclosure operated as a complete bar to an action on the debt.\textsuperscript{58} Though this view was rejected at a fairly early period, nevertheless the mortgagee was left without an effective method of reaching the unmortgaged assets.

The chancellor refused to give anything in the nature of a deficiency decree.\textsuperscript{59} The maxim that equity having assumed jurisdiction for one purpose will retain it and give complete relief was held not to justify a deficiency decree as an incident of a foreclosure suit. If the mortgagee wanted to enforce the debt he had to resort to his legal remedies and incur the expense and possible delay of a separate proceeding. Had this been the limit of the impediments in the way of a deficiency the position of the mortgagee would not have been particularly difficult since a judgment at law carried costs. But a much more serious barrier to the mortgagee's attempts to reach unmortgaged assets was the rule that an action on the debt after foreclosure automatically reopened the foreclosure and reinstated the mortgagor's equity of redemption.\textsuperscript{60} In other words the price of getting judgment at law was the surrender of the benefit of the foreclosure; unless the mortgagee was willing or able to pay this price he could not reach other assets. Thus if he had disposed of the property the action on the debt would be enjoined.\textsuperscript{61} Save in the most unusual case, then, the mortgagee who had foreclosed the security did not have a practical remedy to reach unmortgaged assets. To avoid this predicament the mortgagee might resort to an action on the debt before foreclosure and then, having failed to get satisfaction of the judgment, foreclose the security.\textsuperscript{62} This was not feasible in the usual case not only because of the cost of two proceedings but also because this would necessarily delay the foreclosure decree until the action at law was concluded, and during this period as has been seen the mortgagee did not have a practical remedy to sequester the rents and profits.\textsuperscript{63} Furthermore the mortgagor against whom foreclosure would be sought would not normally have at that time other assets that could be reached by a judgment at law.

When, in the second half of the nineteenth century, power of sale and sale in lieu of foreclosure were developed a more satisfactory method of reaching unmortgaged assets was possible. The price realized at a sale

\textsuperscript{58} See Perry v. Barker, 13 Ves. 198 (1866).

\textsuperscript{59} Maitland, Lectures on Equity 271 (1909). The rule has been changed in the Judicature Act, (1875) 38 & 39 Vict., c. 77; see Poulett v. Hill, [1893] 1 Ch. D. 277.

\textsuperscript{60} Dashwood v. Blythway, i Eq. Cas. Abr. 317 (1729); Lockhart v. Hardy, 9 Beav. 349 (1846).

\textsuperscript{61} Perry v. Barker, 13 Ves. Jr. 198 (1866).

\textsuperscript{62} See 2 Coote, Mortgages 906 (9th ed. 1927).

\textsuperscript{63} See page 582 supra.
either under a foreclosure or under a decree for sale in lieu of foreclosure fixed the value of the security and consequently the balance remaining unsatisfied after the security had been exhausted. Though the chancellor still would not enter a decree for the balance as an incident of the suit to foreclosure he did not place impediments in the way of the mortgagee who sought a deficiency judgment at law. The action at law was not in this case deemed to open the foreclosure and to entitle the mortgagor to another chance to redeem. One advantage to mortgagees or a sale instead of a foreclosure was that it made it possible for the mortgagee to reach unmortgaged assets which the mortgagor might obtain after the sale. But even after the many improvements in the remedies of mortgagees it is not possible under the present English practice for the mortgagee to obtain the security free from the redemption right of the mortgagor, to fix the amount to be credited on the debt, and then to obtain a deficiency judgment for the balance. If the English mortgagee wants the property free from the right to redeem he must forego a deficiency judgment; if he wants a deficiency judgment he must be content to let the security go for an amount to be obtained at a sale to a third person.

**SUMMARY OF ENGLISH REMEDIES**

It is evident, then, that the remedies of English mortgagees at the beginning of the nineteenth century were not harsh and severe; foreclosure did not foreclose effectively; possession or rents and profits pending foreclosure could be got only at great risk; a deficiency judgment could be obtained only in exchange for revival of the right to redeem. In the course of the nineteenth and twentieth centuries the position of the mortgagees has been materially improved; effective substitutes have been found for the ineffective foreclosure; by the power to appoint a receiver of rents upon default the mortgagee may have the mortgagor’s rents applied to keep down interest; and a practical method of obtaining a deficiency judgment has been developed. But in spite of the vast improvement in the position of English mortgagees, English mortgagors enjoy a degree of protection against overreaching that is not available to American mortgagors.

**AMERICAN SYSTEM**

One who is familiar with the American law of mortgages will have no difficulty in making the comparison of the position of English mortgagees with that of American mortgagees. For the purpose of emphasis, how-

64 Rudge v. Richens, L.R. 8 C.P. 358 (1873); Gordon Grant & Co. v. Boos, [1926] A.C. 781.

ever, it is proposed to survey briefly the remedies of mortgagees under typical American systems and upon the basis of the comparison to sketch changes that should be made if mortgagors are really to be protected against overreaching by mortgage creditors.

**FORECLOSURE IN AMERICA**

The American law of mortgages was based upon the English system and though in some colonies there was a strong prejudice against the English court of chancery the basic institutions in the field of mortgages were English. In most jurisdictions the right of the mortgagor to redeem was extinguished as in England by a foreclosure suit. But the American suit differed from the English institution in a number of important particulars. In the first place a foreclosure suit became a much more summary remedy in the American courts. To some extent this was because American courts functioned more efficiently than did the English court of chancery. But foreclosure was more summary and justified the description of "strict" primarily because American judges failed to show the same solicitude for mortgagors that characterized the action of the English chancellor. Extensions and delays were granted much less frequently than under the English practice and mortgagors were almost never given an opportunity to redeem after a decree absolute was entered. The decree meant in America what it had always appeared to mean—that the mortgagor was really foreclosed of all interest in the premises. The effects of the decree were particularly harsh not only because extensions were not freely granted, but also because of the violent and extreme fluctuations in the value of land in America.

66 In a few New England states early statutes provided for foreclosure by entry or by a writ of entry. These are governed by equitable principles: see 3 Jones, Mortgages cc. 29, 30 (8th ed. 1928); Holbrook v. Bliss, 9 Allen 69 (1864). In Pennsylvania the remedy of a mortgagee for the enforcement of the security was a writ of scire facias. See 3 Tiffany, Real Property § 653 (2d ed. 1920).

67 See note (a), 7 Johns. Ch. (N.Y.) 346 (1823), to the effect that Chancellor Kent upon his retirement had disposed of every case and motion brought before him.

68 In 3 Jones, Mortgages § 1994 (8th ed. 1928) it is stated that the time for redemption may be enlarged provided a satisfactory reason is shown. All of the cases cited are English except Downing et al. v. Palmater, 1 T. B. Mon. 64 (1844) (dictum). See also note 3 Bland ch. 196 (1841). In this connection it should be noted that the English practice of permitting redemption until a second decree had been obtained was not followed in some American jurisdictions: see Ellis v. Leek, 127 Ill. 66, 20 N.E. 218, 3 L.R.A. 259 (1889).

69 3 Jones, Mortgages § 2000 (8th ed. 1928). Cf. Doty v. Whitlesey, 1 Root 310 (1791); Bostwich v. Stiles, 35 Conn. 195 (1868). In some instances a comparatively long redemption period was allowed: see Austin v. Burbank, 2 Day 474 (1807); Langdon v. Stiles, 2 Aiken 184 (1827).
To avoid the harshness of the American foreclosure decree various devices were attempted. First during the early depressions, since the judges refused to grant extensions to mortgagors, legislatures enacted moratorium statutes which in effect directed the courts to keep open the right of the mortgagor to redeem for a longer period than that usually allowed. These were, of course, emergency measures and were either repealed or became obsolete after the depressions were over.

Another device relied upon to protect mortgagors from the harsh operation of foreclosures was, paradoxically, the very one to which English mortgagees resorted to avoid the inconveniences of the English foreclosure decree—namely, foreclosure by judicial sale. At a comparatively early date foreclosure by sale was quite generally substituted for a decree of strict foreclosure. In some early cases mortgagors complained that foreclosure by sale benefited mortgagees and sought to have mortgagees limited to a decree of strict foreclosure. This objection, though sometimes conceded by the courts, was brushed aside on the ground that the sale would equally benefit mortgagors. Foreclosure by sale, then, became in many jurisdictions the usual method of barring the mortgagor's right to redeem. But there were a number of differences between the American and the English foreclosure by sale.

The most important difference was that in America the mortgagee might become the purchaser at the sale and obtain the property free from the interest of the mortgagor. The justification for this departure from the English practice was that the mortgagee, in view of his interest in the premises, was likely to bid more than strangers, and that, since the sale was conducted by an officer of the court and not by the mortgagee or his representative, the reason for the English rule barring the mortgagee from purchasing was not applicable. However sound this argument seems, in practice the rule did not work well.

When the mortgagee was permitted to bid, he had no incentive to postpone the sale until third persons had been interested in the property and an opportune time to sell had arrived. Whatever the circumstances of the sale, the mortgagee's interests would be protected by his bid. Consequently under the American practice the mortgagee sought to have the

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71 3 Jones, Mortgages § 1690 (8th ed. 1928).
73 See note 71 supra. 74 3 Jones, Mortgages § 2101 (8th ed. 1928). 75 Ibid.
sale set for the earliest possible date; the only publicity given it by the mortgagee was that required by the statute or decree, usually an obscure legal notice in an obscure legal newspaper. In practice, therefore, the mortgagee had little competition at the sale and usually became the successful bidder.

For these reasons it was thought by many that the sale in lieu of foreclosure was not sufficient to relieve mortgagors of the objections to the American decree of strict foreclosure. Consequently demand was made for a right to redeem from the purchaser at the sale, and in the course of the nineteenth century such rights were very generally given mortgagors and parties interested in the property by statutes creating so-called "statutory rights of redemption." These made it difficult to perfect the title of the purchaser in a comparatively short period and almost invariably discouraged strangers who might otherwise have bid for the property. In spite of these rather obvious objections, however, statutory rights of redemption exist today in many American jurisdictions, and are justified on the ground that they are necessary to prevent the property going for an excessively low bid. Insofar as these rights do deter outside bidders, the sale continues a mere form—a device by which the mortgagee announces the amount of credit on the debt which he is willing to allow for the property which has been transferred to him under the foreclosure. But, as experience in times of economic stress shows, it is not an efficient device for determining value. To meet this objection the statutes in some jurisdictions provide for appraisals, and the fixing of upset prices, but these, too, have tended to discourage bidding and a foreclosure sale has become even more than ever a sale in name alone.

To avoid the expense and delay of foreclosure in court American conveyancers frequently included in the mortgage a power of sale. In some jurisdictions the courts held these powers invalid either as a result of statutes expressly declaring them void or as "clogs on the right to redeem."

77 Ibid.
78 Ibid.; see a useful table in Handbook of the National Conference of Commissions on Uniform State Laws, 280 (1922).
79 See note 97 infra. See also Sutherland, Foreclosure and Sale, 22 Corn. L.Q. 216 (1937)
80 3 Jones, Mortgages § 2074 (8th ed. 1928); Durfee and Dodridge, Redemption from Foreclosure—The Uniform Mortgage Act, 23 Mich. L. Rev. 825, 834 (1925).
81 41 C. J., Mortgages § 1007 (1926); 4 Kent, Com. 146 (11th ed. 1896).
82 Durfee, Cases on Mortgages 355, n. 23 (1915); 41 C. J., Mortgages §§ 1342, 1343 (1926).
From the point of view of mortgagees the power of sale has the advantages of the English power as a method of barring the right to redeem, with the additional advantage that either under a statute or under a stipulation in the power the mortgagor may bid at the sale and, if successful, obtain the property free from the interest of the mortgagor. As a result the sale under a power tends to be in practice a formality for the barring of the right to redeem and in an even more intensified degree is vulnerable to all of the objections to the American foreclosure by judicial sale. In a number of jurisdictions, however, the power of sale has been upheld and is the usual method by which mortgages are foreclosed.

POSSESSION OR RENTS AND PROFITS PENDING FORECLOSURE

Though foreclosure in America is, from many points of view, a more summary remedy than the English remedy, it frequently becomes important for the mortgagor, if possible, to obtain possession or rents and profits before a foreclosure has been concluded. In the early period the principles applicable to this relief were from a superficial point of view the same as those applicable in England. The chancellor would not put the mortgagee into possession of the property during the foreclosure. He would not require a mortgagor in possession to account for rents and profits nor would he appoint a receiver to sequestrate rents and profits preceding foreclosure; as in England the mortgagor's legal remedies were deemed adequate. Those remedies might generally be pursued independently of, or concurrently with, the suit to foreclose and to those remedies the mortgagee who sought possession or rents and profits was left.

As in England the remedy was ejectment. This remedy was subject to all of the objections of the English remedy: it was not summary; its

83 41 C. J., Mortgages § 1430 (1926).
84 See Handbook, National Conference of Commissioners on Uniform State Laws 280 (1922). Foreclosure by exercise of a power of sale is the normal form of foreclosure. Under the Uniform Real Estate Mortgage Act §§ 13 et seq. (1927). A title based upon a sale under a power is not readily marketable in some jurisdictions because of the absence of an adjudication of the existence of the incumbrance or the validity of the proceedings under the power. See Durfee, Cases on Mortgages 371, n. 28 (1915). To meet this objection statutes sometimes provide for a summary of confirmation. See 2 Bagby's Md. Ann. Code art. 66 § 9 (1924).
A committee of the Chicago Bar Ass. recently favored this device. 17 Chicago Bar Record 199 (1936).
85 But after the foreclosure is complete the purchaser or the mortgagee may secure an order for possession. See Schenck v. Conover, 13 N.J. Eq. 220, 78 Am. Dec. 95 (1860). 2 Jones, Mortgages § 890 (8th ed. 1928).

86 2 Jones, Mortgages § 1432 (8th ed. 1928).
prosecution automatically cancelled existing leases subordinate to the mortgage and left the mortgagee confronted with the task of making new arrangements for the utilization of the premises. A mortgagee in possession was required to account for the profits derived from possession. But the standards applied by the American courts for the accounting were not, however, as strict as those of the English chancellors. American judges were inclined to be more lenient toward mortgagees in possession. Though the mortgagee in possession was said to be accountable for what he received, or for what, but for his wilful default, he might have received from the premises, in practice this meant that he would be accountable for what he actually received but not for more unless he had been grossly careless in managing the property. Furthermore the period during which the mortgagee in possession would be required to account was shorter and its limits were more easily foreseeable at the time when possession was taken than under the English practice. Foreclosures were not extended as under the English practice and when the decree of foreclosure was entered it was almost never opened. Consequently American mortgagees were not generally warned that the risks incident to possession as a mortgagee were so great that a prudent mortgagee should only take possession as a last resort. In fact the approved and usual method of foreclosure in some jurisdictions was entry into possession or a writ of entry, the assertion of which led to possession; and in such jurisdictions as a matter of course the mortgagee held possession of the premises during the period allowed by the statute for the redemption of the premises.

In the course of the nineteenth century a number of changes were made in this field. In many jurisdictions either by statute or by judicial rule mortgagees were deprived of the right to possession qua mortgagee. It was deemed undesirable to permit the mortgagee to take over control of the premises until after the mortgagor had been foreclosed. To accomplish this end the remedies by which he might formerly have obtained possession were denied to him. If the policy upon which these changes appear to have been based had been followed consistently the mortgagee would not, in such jurisdictions, have been able to reach the rents and profits of

88 Tiffany, Real Property § 614 (a) (2d ed. 1920).
89 2 Jones, Mortgages § 1425 ff. (8th ed. 1928). See also 35 Col. L. Rev. 1248 (1935).
90 See id. at § 1438. In some cases the mortgagee in possession is given a commission for managing the property; see 24 Col. L. Rev. 318 (1924).
91 Durfee, Cases on Mortgages 382 (1915), does however give such a warning.
92 Walsh, Mortgages 19 ff. (1934).
the security pending the foreclosure proceedings. This appears to be the present situation in some jurisdictions. But in a number of states, even though the legislature had abolished the right of the mortgagee to possession, a mortgagee might, under certain circumstances, obtain rents and profits during the foreclosure. Thus in a number of jurisdictions after the remedy of ejectment was abolished the chancellor would, upon a showing of a need of reaching rents and profits, or in pursuance of a stipulation in the mortgage, appoint a receiver to sequestrate rents and profits during the foreclosure. Likewise to a limited extent the statutory restrictions might be avoided if certain stipulations, as for example, a pledge or an assignment of rents, were included in the mortgage deed. Then, too, the courts generally decided that a mortgagee who had been permitted to enter as a mortgagee would not be evicted unless the obligation secured by the mortgage had been discharged. In spite of the various limitations then, an American mortgagee today may in many jurisdictions reach rents and profits pending foreclosure. And though the remedies available (as for example receiverships) are not efficient they are generally remedies which may be used by mortgagees without great risk and without releasing the mortgagor's tenants. Furthermore it should be noted that under the modern moratorium statutes the mortgagor may obtain an extension of the time for redemption only on condition that he account to the mortgagee for the rents or the value of possession during the extension. In any event modern American courts do, under many circumstances, assist the mortgagees in reaching rents and profits pending foreclosure, even at the cost of depriving mortgagors of possession of the security.

DEFICIENCIES

The inadequacy of the American system from the point of view of mortgagors is especially clear in connection with deficiencies. Though the American courts originally followed the English rule that the mortgagee

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94 See 4 A. L. R. 1408 (1919); 87 A. L. R. 626 (1933).
95 See, 44 Yale L. J. 701 (1935); 26 A. L. R. 33 (1926); 36 A. L. R. 609 (1925); 55 A. L. R. 533 (1928); 87 A. L. R. 1008 (1933).
96 A. L. R. 1405 (1919); 55 A. L. R. 1020 (1928); 87 A. L. R. 625 (1933); 43 Yale L. J. 107 (1933).
97 2 Jones, Mortgages §§ 886-87 (8th ed. 1928); cf., however, cases cited id. § 888 (8th ed. 1928).
98 See 2 Univ. Chi. L. Rev. 33 (1934).
must go to the law courts if he wanted to reach unmortgaged assets,\textsuperscript{100} none of the other English impediments were put in his way.\textsuperscript{101} It was early established that the action on the debt did not reopen the foreclosure and revive the right of the mortgagor to redeem.\textsuperscript{102} To prevent "double" satisfaction a judgment on the debt after foreclosure would be limited to the difference between the value of the security, determined normally by the verdict of the jury in the action for the deficiency, and the amount of the debt plus interest and costs.\textsuperscript{103} Under this system excessive deficiency judgments were not common.

But when foreclosure by judicial sale or by the exercise of a power of sale was substituted for strict foreclosure it was decided that the amount to be credited on the debt for the security seized by the creditor was conclusively determined by the amount realized at the sale.\textsuperscript{104} The debtor was then protected against double satisfaction only if the amount of the bid equaled or exceeded the value of the security. But since confirmation would not be refused or a sale out of court set aside on the ground that amount of the bid was less than the value of the property\textsuperscript{105} and since in many cases the bid represented merely the amount of credit on the debt which the mortgagee was willing to allow for the security, the mortgagor had little protection against an unduly large deficiency judgment save the


\textsuperscript{101} In Connecticut a foreclosure decree was originally held to be a bar to an action on the debt. Derby Bank v. Landon, 3 Conn. 62 (1819). The rule was changed by statute in 1833; see Conn. Public Acts 1833, c. 18. In Illinois a decree of strict foreclosure is probably a bar to a deficiency since the relief will not be given unless the mortgagee offers to take the property in satisfaction of the debt. See Carpenter v. Plagge, 192 Ill. 82 (1901). \textit{Cf.}, however, Vansant v. Allmon, 23 Ill. 26 (1859).

\textsuperscript{102} Hatch v. White, 2 Gall. 152 (1814); Lansing v. Goelet, 9 Cowen 346 (1827); \textit{contra}, Lovell v. Leland, 3 Vt. 58 (1831) (dictum).

\textsuperscript{103} Hatch v. White, 2 Gall. 152 (1814); Amory v. Fairbanks, 3 Mass. 562 (1793) (execution awarded for balance due on bond after deducting value of the security according to appraisement).

\textsuperscript{104} See Walsh, Mortgages 317 (1934); 3 Jones, Mortgages § 2206 (8th ed. 1928). For extreme applications see Helvering v. Midland Mutual Life Insurance Co., 57 Sup. Ct. 423 (1936); 4 Univ. Chi. L. Rev. 677 (1937); Ivanhoe Building and Loan Ass'n v. Ort, 295 U.S. 243 (1935); \textit{In re} Howell, 215 Fed. 1 (CCA 2d) (1914); Equitable Trust Co. of New York v. Western Pacific Ry. Co., 244 Fed. 485 (1917). See also Sturges, Cases on Credit Transactions, 870 (2d ed. 1936).

\textsuperscript{105} 3 Jones, Mortgages §§ 2107, 2108 (8th ed. 1928).
indulgence of his mortgagee. This was especially true after it had been determined that it was proper to include an order for payment of the deficiency as a part of the foreclosure suit. To some extent this hardship has been alleviated by the statutory devices of appraisal, upset price, stays and rights to redeem from the purchaser at the sale. But since these have tended to discourage outside bidders and have resulted in the sale being merely a formal step in a foreclosure the mortgagor under the American system has little protection from a mortgagee who is inclined to seek an excessively large deficiency judgment.

SUMMARY OF AMERICAN SYSTEM

In comparison with the English system, then, the salient features of the American system would seem to be the following: 1. Foreclosure without sale was really as it is described "strict"; it operated summarily, harshly and oppressively. 2. Foreclosure by sale, which was substituted for strict foreclosure in an effort to protect mortgagors, has failed in its purpose, since it is not a reliable method of determining the value of the security; therefore, especially in times of depression, mortgagees, since they are permitted to bid at the sale, may obtain the security at their own price, free from the interest of the mortgagor; in a number of jurisdictions which uphold powers of sale this may be done summarily and cheaply. 3. The system is not adequate to protect mortgagors from the danger of "double" satisfaction since it does not effectively prevent excessive deficiency judgments. 4. The system, insofar as it permits receiverships for the purpose of sequestering rents and profits pending foreclosure, operates harshly from the point of view of mortgagors and, at the best, affords mortgagees a poor remedy.

What then are the remedies? The experiences of the recent depression

106 During the depression the traditional rules were somewhat relaxed. See Suring State Bank v. Giese et al., 210 Wis. 489, 246 N.W. 556, 85 A. L. R. 1477 (1933) (confirmation refused unless mortgagee would consent to a credit on the debt equal to the value of property as determined by the court) and notes, 33 Col. L. Rev. 744 (1933); 17 Minn. L. Rev. 821 (1933); 84 U. of Pa. L. Rev. 223 (1935); 42 Yale L. J. 960 (1933); 11 Wis. L. Rev. 203 (1936); 104 A. L. R. 375 (1936). The relief usually given was either a postponement of the foreclosure or a limitation of the deficiency judgment to the difference between the value of the security, determined by the court or a jury, and the amount of the debt plus interest and costs; compare the early American strict foreclosure practice; see note 103 supra.


108 See note 80 supra.


110 For suggested revisions of the New York system see Sutherland, 22 Corn. L. Q. 216 (1937).
indicate that a comprehensive revision of the mortgage laws is needed. In connection with such a revision it is believed that the English experience will be helpful. In the light of that experience the following suggestions are ventured.

1. After specified defaults have continued for a prescribed period the mortgagee should be permitted to enforce the security either by a decree of foreclosure without sale or by a sale either under a decree for foreclosure by sale or under a statutory power of sale. If the mortgagee elects to obtain title under a decree without sale he should not be permitted to obtain a deficiency judgment. If he elects a sale he should be permitted to obtain a judgment for the deficiency, if any, which remains after the proceeds of the sale have been applied on the debt. But, having elected a sale, he should not be permitted to purchase at the sale.

2. If the mortgagee has applied for a decree without a sale, the Court should be authorized to order a sale upon the application of the mortgagor or of anyone having an interest in the equity provided security is furnished for the expenses of a sale. If a sale is ordered under these circumstances the mortgagee should be permitted to protect his interest by bidding at the sale.

3. Statutory rights of redemption should be abolished; they operate to discourage bidding and, if the mortgagee is barred from purchasing at the foreclosure sale, the principal justification for such rights will cease.

4. Receiverships should be restricted to cases in which the protective device of a receivership is needed to prevent waste, or (to use the modern but less elegant term) "milking" of the security. It should not be available, as it is today, to sequestrate rents and profits pending a foreclosure.

5. If it is deemed desirable that the mortgagee should be able to obtain rents and profits pending a foreclosure a summary method should be provided to enable the mortgagee to collect rents from the mortgagor's tenants (even though holding under leases subordinate) and, save perhaps in the case of homesteads, from the mortgagor himself.

These changes it is believed would go far to protect both mortgagors and mortgagees from the defects of the present system and, at the same time, would not impose undue restrictions upon either group.

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iii The foreclosure of bond issues should be covered by a special statute. In the absence of such statute, the general foreclosure statute might well provide that if the obligation secured be held by four or more persons the choice of foreclosure without sale or foreclosure with sale should be determined in accord with the wishes of the holders of two-thirds of the obligation secured. If foreclosure without sale is selected the court should be empowered to vest the title perfected by the foreclosure in the persons designated to take title under a plan of reorganization which the court has approved as fair.