The Law and Practice of Mortgage Foreclosure in the State of New York

Walter P. Cooke
Cornell Law School
THE LAW AND PRACTICE OF MORTGAGE FORECLOSURE IN THE STATE OF NEW YORK.

A THESIS
WRITTEN FOR GRADUATION FROM THE SCHOOL OF LAW OF CORNELL UNIVERSITY, BY
WALTER P. COOKE.

1891.
THE TABLE OF CONTENTS.

INTRODUCTION.--------------------------------------------------------------- 1
THE ACTION TO FORECLOSE A MORTGAGE.------------------------------------- 3
Court and place of trial.-------------------------------------------------- 5
Lis pendens.--------------------------------------------------------------- 6
Parties plaintiff.---------------------------------------------------------- 7
Parties defendant (Necessary).--------------------------------------------- 9
Proper parties.------------------------------------------------------------- 12
Parties defendant liable on the mortgage debt...-------------------------- 13
Pleadings.---------------------------------------------------------------- 16
Tender.------------------------------------------------------------------- 17
The complaint.------------------------------------------------------------- 17
Answers and defenses.------------------------------------------------------ 18
Procedure—trial.----------------------------------------------------------- 22
Practice on default.-------------------------------------------------------- 23
Receiver.---------------------------------------------------------------- 24
Judgement.---------------------------------------------------------------- 25
Sale.--------------------------------------------------------------------- 26
Judgement for deficiency.---------------------------------------------------- 27
Surplus.------------------------------------------------------------------ 28
Costs.-------------------------------------------------------------------- 28
FORECLOSURE BY ADVERTISEMENT.------------------------------------------ 30
STRICT FORECLOSURE.------------------------------------------------------ 34
A person owning a debt secured by a mortgage has two remedies for enforcing the payment of the same. He may sue the debtor on the bond or other evidence of the debt, or foreclose the mortgage. Foreclosure, as defined by Mr. Hillard, is "the process by which the mortgagee acquires or transfers to a purchaser an absolute title to the property, of which he has previously been only a conditional owner, or upon which he has previously had only a lien or incumbrance" (a).

The history of foreclosure is a part of the history of the law of mortgages. The growth and expansion of one has been identical with the growth and expansion of the other. As moulded by the courts of equity, a mortgage, from a clumsy device for the security of a debt, instituted in an age when the creditor class possessed great power and the debtor but little or none, vesting the absolute estate in the creditor upon failure to perform

(a) 2 Hillard on Mortgages.1.
the condition, thus working injustice and oppression, has
developed, though still a security for the debt, into an
equitable lien, a mere incumbrance instead of an estate,
fulfilling in a nearly perfect manner the purposes for
which it is used; so the practice of foreclosure, from the
common law method of vesting the absolute title of the
estate mortgaged in the mortgagee, no matter how much
greater than the debt secured that estate might be, has,
as justice and equity required, been modified until the
generally accepted practice is now from a sale of the
mortgaged premises, to pay the debt and return the bal-
ance to the mortgagor. A more equitable system than
this could hardly be conceived; and the evolution of the
law of mortgages, from the awkward contrivance of the com-
mon law to the broad and liberal theory of the law as
exists in New York to-day, is a striking illustration of
the fact that law is constantly changing, and with a
rapidity consistent with stability adapting itself to the
needs of each age.

The practice of foreclosure is said to have existed
under the civil law and some writers profess to believe
that the principles of hypothecation, redemption and fore-
closure are to be found among the early Israelites, but
according to Mr. Wiltsie the civil law is the earliest
known system of jurisprudence, in which the rights con-
ected with pledges were fully and accurately defined (a)

Under the civil law the mortgagee had two remedies: one
against the mortgagor for the debt and also a remedy in

(a) Wiltsie on Mortgage Foreclosure sec. 2.
rem, by which the mortgaged property was sold and the proceeds applied to the satisfaction of the debt, and the surplus, if any remained, paid over to the mortgagor. (a) This is substantially the equity action of to-day, which is explained by the fact that equitable principles have been drawn largely from the civil law.

The purpose of a foreclosure suit is a two-fold one. First to give good title to the purchaser and to apply the moneys arising from the sale to the payment of the mortgage debt; and secondly to obtain, in case of a deficiency, a personal judgement against the parties liable for the debt. There is a wide diversity in the laws of foreclosure in the different states of the Union but the method in most general use is the bill in equity for the foreclosure of the mortgage.

The practice in the State of New York, as set forth in the provisions of the Code of Civil Procedure, Court Rules and the decisions of its courts, provides for,

I. An action to foreclose a mortgage.
II. Foreclosure by advertisement.
III. Strict foreclosure.

The question as to whether or not, strict foreclosure exists in this State, is a mooted one and will be considered later in this paper.

THE ACTION TO FORECLOSE A MORTGAGE.

The first inquiry, which naturally suggests itself, is when may a mortgage be enforced; and it may be said in

(a) Story's Equity sec. 1024.
general that a mortgage becomes enforceable, when default is made in its payment. The terms of a mortgage or the debt it secures, may determine the time when it can be enforced. A debt, secured by a mortgage, being payable on demand, the mortgagor may foreclose without any previous demand. (a) A mortgage may by its terms be enforceable for non-payment of interest— a foreclosure in such a case was held legal and valid, though but $17.80 of interest were due. (b) Where a mortgage provides that it is to become due, if taxes are not paid, relief cannot be given against the clause. (c) Or where the mortgagor having sold the property to one, who has assumed the mortgage, requests the mortgagee after the mortgage is due to foreclose, lest the property should become insufficient, he is bound to do so or the mortgagor will be discharged from liability on his bond. (d)

If the mortgage is payable in installments, foreclosure may be had for the amount due.

Where final judgment for the plaintiff has been rendered in an action to recover any part of the mortgage debt, an action cannot be commenced or maintained to foreclose the mortgage, unless an execution against the property of the defendant has been returned, wholly or partly unsatisfied. (e) And it may be stated here that

(b) House v. Eisenlord. 17. Weekly Dig. 203.
(c) O'Connor v. Shipman 48. How Pr. 126.
(e) Code Civ. Pro. sec. 1630.
under section 1628 of the Code, while an action to fore-
close a mortgage on real property is pending or after 
final judgment for the plaintiff therein, no other 
action can be maintained to recover any part of the mort 
gage debt, without leave of the court in which the for-
mer action was brought.

The right to foreclose is not barred by the same 
lapse of time that bars an action upon a note. A simple 
contract debt, secured by a mortgage upon real property, 
although barred in six years when standing alone, may be 
enforced by foreclosure at any time within twenty years. (a)

The statute of limitations begins to run from the 
time of condition broken, and uninterrupted possession 
for a period of twenty years from that time, without any 
payment or demand of principle or interest, or any claim 
on the part of the mortgagee, raises a presumption that 
the mortgage debt has been paid, and, in the absence of 
circumstances excusing the delay, bars the right of the 
mortgagor to foreclose his mortgage. (b).

COURT AND PLACE OF TRIAL. The action may be brought 
in the Supreme court, (c) and also in the superior courts 
if the property mortgaged is within the city, where the 
court is located. (c)

(a) Gillett v. Smith 18 Hun. 10.
(b) Belmont v. O'Brien 12 N.Y. 394.
   Wiltsie on Foreclosure sec. 62.
(c) Code, sec. 217, 263, sub. 1.
The county courts have jurisdiction for the foreclosure
of mortgages, but only where the property is within the
county; (a) and that court has no power to reform a mort-
gage and foreclose, (b) nor to correct a mistake there-
in (c). By section 982 of the Code, the action to fore-
close must be brought, in all cases, in the county, in
which the mortgaged property or some part of it is sit-
uated: (d), but if no objection is made that the place of
trial is not the proper county, it will not affect the
regularity of the proceedings. (e)

LIS PENDENS. The notice of the pendency of the action
is indispensable to a foreclosure suit. Its effect is to
cut off all grantees and incumbrancers, subsequent to the
filing of the notice. The provisions of the Code (f)
require, that the plaintiff must, at least twenty days be-
fore final judgment directing a sale is rendered, file
in the clerk's office of each county in which the mort-
gaged property is situated, a notice of the pendency of
the action, which must state the names of the parties to
the suit, the object of the action, and contain a brief
description of the property in that county, affected by
it; and also the date of the mortgage, the parties thereto
and the time and place of recording it.

(a) Arnold v. Rees 18 N.Y. 37.
(b) Avery v. Willis 24 Hun. 548.
(c) Thomas v. Hannon 46 Hun. 78.
(d) Gould v. Bennett 59 N.Y. 124, also 43 N.Y. 224.
(e) Marsh v. Lowry 26 Barb. 197.
(f) Code, sec. 1631. 1670-4.
The court rules (a) further require, that in all foreclosure actions, the plaintiff when he moves for judgment, must show by affidavit that the notice of lis pendens has been filed at least twenty days before such application.

**PARTIES PLAINTIFF.** It is a general rule of law that the persons, who are to be bound by a judgement of a court, should be brought within its jurisdiction. In most cases it is no very difficult problem to determine who such parties are, but in an action to foreclose a mortgage, the question of whom to make parties becomes sometimes a difficult and complicated one. The Code provides that all persons, having an interest in the subject of the action, and in the obtaining of the judgment demanded, may be joined as plaintiffs. (b) And the following section requires that every action be prosecuted by the real party in interest, except that a trustee may sue without joining the cestui que trust.

Where more that one person is interested, all should join as plaintiffs and if any refuse so to join, the general rule is to make him a party defendant. A sole mortgagee it is hardly necessary to say, is not only a proper but the only party plaintiff. An assignee of a bond and mortgage, who has absolute title to the same, may bring an action to foreclose it. (c)

---

(a) Supreme court rules no. 60.
(b) Code 446. 447. 449.
(c) Andrews v. Gillespie 47 N.Y. 487.

Franklin v. Hayward 61 How. Pr. 43.
Joint mortgagees, or one or more of them may foreclose (a) and the same rule applies to partners. In case of joint mortgagees, where one dies the doctrine of survivorship applies. It is the rule in this State (b) that bonds and notes maturing at different times, but secured by a single mortgage, are equal and concurrent liens.

The assignee of a mortgage unaccompanied by the bond cannot foreclose, but the assignee of the bond or debt may bring an action to foreclose, though the mortgage is not assigned (c) and the same rule is good in the case of an assignee in bankruptcy, or by general assignment, or the receiver of an insolvent corporation. (d) An assignee pendente lite may continue a suit already commenced. (e) The personal representatives of a deceased mortgagee may bring such an action, but his heirs, devises and legatees cannot generally do so. (f)

A foreign administrator or executor cannot foreclose, but he may assign the mortgage to a resident who may then foreclose it. (g) The owner of a mortgage, who has pledged it as collateral security to a debt, less than the face of the mortgage, has an interest which entitles him to foreclose. (h) and the pledgee is a necessary party. But the owner of two mortgages on the same land cannot foreclose both at the same time in separate suits. (i)

(b) 84 N.Y. 494.
(c) 36 N.Y. 44.
(d) 22 N.Y. 360.
(e) 7 Paige 18.
(f) 28 N.Y. 61. 28 N.Y. 226. 10 N.Y. 509.
(g) 32 N.Y. 21. at 41 & 51.
(h) 64 N.Y. 657.
(i) 10 Paige 413.
Since the acts of 1848 and 1849, it has been settled law that a married woman can own and control an estate in lands as a feme sole, and may own and foreclose a mortgage in her own name. (a) And her husband need not be made a party to the action. (b)

**PARTIES DEFENDANT.** Parties defendant are usually divided into two classes—necessary and proper parties. The terms are used, however, with such carelessness and inaccuracy as to make definition of them well nigh impossible. Mr. Wiltsie (c) holds necessary parties to be those who are necessary for the purpose of extinguishing or cutting off the entire equity of redemption and the interests of all who claim under the equity by subsequent mortgages, judgments or otherwise, i.e., those parties, who are necessary in order to perfect the title. And that the term proper parties indicates those persons as to whom the plaintiff has an option, whether to make them parties or not.

Our Code provides (d), as do the codes of most of the states, that any person may be made a defendant, who has or claims to have an interest in the controversy adverse to the plaintiff or who is a necessary party to a complete determination or settlement of the questions involved therein; hence as a general rule, any person in—

(a) Power v. Lester 17 Iowa Pr. 413 aff'g

Power v. Lester 23 N.Y. 527.

(b) Jones v. Roth 18 Weekly Dig. 489.

(c) Wiltsie on Mortgage Foreclosure, sec. 15.

(d) Code 447.
tereated in the land mortgaged or having an interest in
the mortgage debt adverse to the plaintiff, may be made
a defendant. The ownership of any estate, however re-
mote or insignificant, makes one a necessary party def-
endant, in order to perfect the title. (a)

Of those having an interest in the fee title, the
mortgagor is of course a necessary party, (b) but if
he has made an absolute conveyance of all his interest
he is not a necessary party, but even if not actually
necessary, the mortgagor is always a desirable party. (c)
The wife, of a mortgagor or owner of the equity of re-
demption, is a necessary party as she has an inchoate
right of dower in the property or equity of redemption
which is not affected by a foreclosure to which she was
not a party. (d) Where the wife did not join in the
execution of the mortgage, her right of dower cannot be
cut off except by her own act, and if she joined in the
mortgage, she is of course a necessary party. (e)
If the mortgage was executed before marriage, the wife
should be made a party, (f) and also where the mortgage
was given for purchase money and she did not sign. (g)

In this State the law has been settled in the case
of Bertles v. Munan (h) that under a conveyance to hus-

(a) Wiltsie. sec. 16.
(b) Reynor v. Selmes 52. N.Y. 379.
(d) Mills v. Van Vorhies 20 N.Y. 412.
(f) 42, Barb. 386.
(g) Mills v. Van Vorhies 20. N.Y. 412.
(h) 92. N.Y. 152.
band and wife jointly they take as tenants by the entire...
ty and upon the death of either the survivor takes the whole estate; and in such a case it would be unnecessary to bring the heirs of the deceased joint owner in as parties. Heirs of a mortgagor or owner of the equity of redemption, (a) trustees holding an interest in mortgaged premises, (b) an assignee in bankruptcy or by general assignment or receiver, (c) infants, lunatics, tenants of the estate, (d) and remaindermen and reversioners are necessary parties defendant. (e)

The second class of necessary parties are those persons who have acquired liens and incumbrances upon the property or the equity subsequent to the execution of the mortgage. (f) This class includes subsequent mortgagees, (g) and judgment creditors, (h) purchasers at tax sales, (i) a general guardian of an infant, (j) and assignees by general assignment. (k) Also executors and ad-

(a) Dodd v. Neilson 90 N.Y. 243.
(b) Legett v. Ins. Co 64 Barb 36.
(c) Story's Eq. Pl. 193. and cases cited.
(d) Wiltaie sec. 152. note 3. and cases cited.
(e) Clarkson v. Skidmore 46 N.Y. 297.
(f) Brevoort v. Brevoort 70 N.Y. 136.
(g) Wiltaie. sec. 158.
(h) Gage v. Brewster 31 N.Y. 218.
(i) Verdin v. Slocum 71 N.Y. 343. also 43 N.Y. 708.
(k) Code 426.
ministrators of deceased subsequent lienors, (a) assignee
of a subsequent mortgage, judgement or other lien, (b)
owner of mechanic’s lien, (c) and part owners and others,
having equitable interests in the mortgage under fore-
closure or liens contemporary with it, not joining as
plaintiffs. (d)

PROPER PARTIES. As a general rule, it may be said
that the only necessary parties to the foreclosure of a
mortgage, are the mortgagor and mortgagee and those per-
s ons, who have acquired rights under them, subsequent to
the mortgage; but there are many cases where it is not
necessary but highly proper, to make other persons par-
ties defendant. Thus a mortgagee may desire to make
a prior mortgagee a defendant for the purpose of acser-
taining the exact amount of his incumbrance, and having
it paid from the proceeds of the sale, or he may wish to
determine a contest as to priority between two mortgages
on the same land, (e) which can be directly litigated in
a foreclosure action. (f) The cases are many, in which
persons may very properly be made parties defendant, for
the Code allows ‘any person to be made a defendant, who
has or claims an interest in the controversy, adverse to
the plaintiff, or who is necessarily a party defendant
for the complete determination or settlement of the
questions involved therein’. (g)

(a) Lockman v. Reily 98 N.Y. 64.
(b) Himslow v. McCall 32 Barb. 241 also 58 N.Y. 168.
(c) Bank v. Goldar 75 N.Y. 127 also 74 N.Y. 341.
(d) Code 1632.
(e) Miltsie, sec. 187.
(f) 111 N.Y. 170.
(g) Code 447.
PARTIES DEFENDANT--LIABLE ON THE MORTGAGE DEBT. In the early history of mortgages, the mortgagee had but a single remedy—an action in rem against the mortgaged property—and if the property was insufficient to satisfy the debt, he had no other way of securing the balance. But at the present time the mortgagee is not confined to the proceeds of the land alone for the satisfaction of his debt, but where a deficiency occurs may get a personal judgement against the debtor and those persons liable for the mortgage debt. Having considered the parties, necessary and proper, in order to enable the plaintiff to exhaust his remedy against the land and make perfect the title to it, the next study will be, that class of persons who are personally liable for the mortgage debt.

In respect to this class Mr. Wiltsie makes two divisions

Parties originally liable.
Parties subsequently liable.

The parties originally liable are the mortgagor, who signs the bond or note and covenants in the mortgage for its payment. (b) All persons who sign the bond or note which the mortgage accompanies, (c) or guarantee the same. (d) A married woman who signs the bond (e) and executors and administrators of deceased persons who were liable. (f) In the absence of an express covenant to pay, there is no personal liability and mort-

(a) Wiltsie, sec 205. (d) 91 N.Y. 392.
(b) 53 N.Y. 280. 81 N.Y. 535. (e) Laws 1864, chap. 381.
(c) 59 N.Y. 533. 59 How Pr. 120. (f) 68 N.Y. 439.
gagee's remedy is confined to the mortgaged premises (a)

One who accepts a deed, in which he assumes the payment of a mortgage given by his grantor, becomes thereby the principal debtor. (b)

Persons subsequently liable include those persons who were strangers to the execution of the mortgage, but who have subsequently become liable for the mortgage debt. (c) There are, in general, two ways of creating this liability:

The mortgagor may create it by conveying his equity of redemption, and binding his grantee to assume the payment of the debt; or

The mortgagee may create it in an assignment by guaranteeing the payment of the mortgage. (c)

A purchaser, assuming the payment of a mortgage, is liable personally and becomes the principal debtor while the mortgagor becomes a surety. (d) But a purchaser is not liable for the debt, unless he assumed the mortgage and agreed to pay it. The mere fact that the transaction was made, subject to the mortgage, will not imply an agreement to pay the same. (e) and a person is not personally liable, when his grantor is not, although he assumed and agreed to pay. (f)

---

(a) Mack v. Austin 95 N.Y. 513.
(b) Wales v. Sherwood 52 How. 413.
(c) Nilsen v. Sherwood 218.
(d) 73 N.Y. 212, 95 N.Y. 513, 75 N.Y. 103.
(e) 100 N.Y. 126, 84 N.Y. 660, 94 N.Y. 384.
(f) Dunning v. Leavitt 88 N.Y. 30.
A grantor cannot release his grantee from an obligation to pay the mortgage, which the grantee had assumed and agreed to pay. (a) Intermediate purchasers, who have assumed payment are liable. (b) A stipulation in a mortgage, whereby the mortgagee assumes and agrees to pay a prior mortgage, does not impose upon such mortgagee a personal liability for the prior mortgage debt. (c) The assignor of a mortgage and intermediate assignors, guaranteeing payment are personally liable. (d)

Married women obligating themselves in any of the preceding ways are personally liable, (e) and the estates of deceased persons who had become personally liable for a mortgage debt, are equally liable, and the personal representatives not the heirs or devisees are the proper parties. (f)

---

(a) Douglass v. Wells 16 Hun 88.
(b) Cashman v. Henry 78 N.Y. 103.
(c) Garnsey v. Rogers 47 N.Y. 233.

(d) Officer v. Burchell 19 Al Law J. 57. 44 N.Y. 576.
Craig v. Parkis 40 N.Y. 181.
(e) Cashman v. Henry 78 N.Y. 105.
(f) Leonard v. Morris 9 Paige 90.
Scofield v. Docher Sp N.Y. 491.
PLEADINGS. The action to foreclose is commenced like an ordinary civil action, by the personal service of a summons and complaint. The exact form of the summons is prescribed by the Code. (a)

Where a summons is served without a complaint, it is usual to serve with it a notice of the object of the action and of no personal claim. Sec. 423 of the Code provides that where a personal claim is not made against a defendant, a notice subscribed by the plaintiff's attorney, setting forth the object of the action and a brief description of the property affected by it and that a personal claim is not made against him may be served with the summons. If the defendant so served unreasonably defends the action costs may be awarded against him. If this notice is served upon a defendant it is unnecessary to serve a copy of the complaint, unless he demand the same in writing.

The provisions of the Code relating to service by publication in case a defendant is a foreign corporation, or is not a resident of the state, or where after diligent inquiry he remains unknown to the plaintiff or the plaintiff is not able to ascertain whether the defendant is or is not a resident of the state, or where the defendant has departed with intent to defraud his creditors, apply to actions to foreclose mortgages. (b)

The practice in the service of summons upon married women, infants, lunatics, and incompetent persons is fully regulated by the Code. (c)

(a) Code sec. 418.
(b) " 436.
(c) " secs. 426, 427, 428, 429, and 450.
The voluntary appearance of the defendant is equivalent to personal service of summons upon him. (a)

TENDER. A valid tender can be made at any time after the debt is due, and a good and sufficient tender for the full amount due upon the mortgage, made before foreclosure discharges the lien, although the debt remains. (b)

And the Code provides (c) that where an action is brought to foreclose a mortgage upon which a portion of the principal or interest is due, and another portion of either is to become due, the complaint must be dismissed without costs against the plaintiff, upon the defendants paying into court, at any time before final judgment is rendered, the sum due together with the plaintiff's costs. Where tender is made before judgment, either party may apply to the court to adjust costs. (d)

THE COMPLAINT. The complaint in foreclosure actions is practically the same as in other actions. It must contain the title of the action, and state in plain language the facts constituting the cause of action, together with a demand for the judgement to which the plaintiff believes himself entitled (e) and by section 1629, show that no other action has been brought to recover any part of the mortgage debt. In this State the facts constituting the cause of action, and not the evidence of those facts should appear in the complaint. (f)

(a) Code 424.  
(b) Thomas on Mtges. 128.  
(c) Code sec. 1634.  
(d) 16, How. 59.  
(e) Code 481.  
(f) Code sec. 481.  
50 N.Y. 547.
The breach of the condition, which gives the right to foreclose and the amount of plaintiff's debt due should be alleged, (a) and where the assignee of the mortgage brings the action, he should set out in the complaint all the assignments thereof—a mere allegation that the plaintiff by several means assignments, is the owner and holder of the note without other allegations showing title is defective. (b) It is necessary to allege whether any action has been brought to recover any part of the debt, and if such action has been brought, whether any part thereof has been collected. (c)

In general an allegation of the time and place of recording should be made. The complaint must set forth fully the relief that the plaintiff believes himself entitled to, (d) and should demand a personal judgment, in case of a deficiency, against the parties liable on the debt.

ANSWER AND DEFENSES. The contents of the answer in a foreclosure action, as in other civil actions, is regulated by the Code. (e) A defendant may plead the same matters of defense against the mortgage, as were available against the note or bond for which the mortgage was given; and if he admits that the rights and interests of the plaintiff are correctly set forth in the complaint, should set up new matter constituting a defense, counter-claim, or set off.

(a) 64. How. 132. (c) 4. Paige 549.
(b) 7. N.Y. Civ Pro B219. (e) Code sec. 500.
The various defenses, which the defendant can set up may be grouped under the following general heads:

Defenses affecting the existence of the mortgage.

Want of consideration.

Usury.

Fraud.

Misrepresentation, mistake and duress.

Defenses that nothing is at the time due upon the mortgage.

Defenses involving claims of title.

Counter claims and estoppels

Under defenses affecting the existence of the mortgage, the defendant may deny its execution and delivery, plead that the mortgage was executed by an infant, who upon coming of age has disaffirmed it, (a) or that the mortgagor was insane when the mortgage was executed. He may set up that there was some defect in the execution of the mortgage, (b) or that some material alteration has been made to it. (c)

It being common information that want of consideration may be shown in answer to an action on a contract, it follows necessarily that a want of consideration for a mortgage may be set up as a defense in an action to foreclose it. (d) And where a partial consideration was

(a) Thyme v. Powers 36 How Pr. 269.
(b) Ins Co v. Staats 21 Barb. 570.
(c) Marcy v. Dunlap 5 Lansing 365.
(d) Dunning v. Leavitt 85 N.Y. 30.
given, the decree should be rendered for that amount only. (a)

It is a good defense to an action that the mortgage was executed upon an illegal or void consideration. (b)

Usury may be pleaded as a defense and if proved is a good defense (c), and the mortgage will be declared void, but where a valid and subsisting debt is included in a security or made the subject of a contract, which is void for usury, it will not be disturbed. (d)

In this State, where the debt is regarded as the principal thing and the transfer of the debt carries the mortgage, a defendant cannot set up the want of a formal assignment of the mortgage. (e)

In case of a transfer obtained by fraud, payment to the mortgagee is a good defense against the transferee. (f) and in any case payments to a mortgagee without notice of the assignment are good. (g)

Fraud can be set up by the mortgagor only where it was practiced upon him by the mortgagee or his agent or with the knowledge of the mortgagee, and at the time of the transaction, (h) but it must be shown that defendant

(a) Dunham v. Cudlinp 94 N.Y. 129.
(b) Willseie. sec. 342.
(c) Yatch v. Cooke 65 Barb. 30. Also 35 Barb. 96.
(d) Patterson v. Birdsall 64 N.Y. 294.
(e) 5 Cow. 202 4 John 41.
(f) Hall v. Irwin 66 N.Y. 649.
(g) Van Kuren v. Corkins 4 Hun. 129.
(h) Read v. Lataon 15 Barb. 9.
was in fact defrauded and by the mortgagee; and all facts necessary to establish fraud and bring it home to the mortgagee, must be stated in the answer. (a)

Misrepresentation, mistake and duress are good defense in a foreclosure action; (b) And among the defenses that nothing at the time is due upon the mortgage, an allegation of a condition precedent, or that the mortgage was given for indemnity only and that the obligation has been paid, is good. (c)

Payment is of course a good defense, (d) and a release of a part of the mortgaged premises and a denial of liability on contract of assumption may be pleaded, (e) thus—a grantee, who has assumed the mortgage, may defend if evicted by a paramount title. (f)

Defenses involving claims of title cannot be litigated in a foreclosure action. (g)

The doctrine of estoppel applies in foreclosure suits. A purchaser of mortgaged premises, who takes a deed sub-

(a) Aiken v. Morris 2 Barb. Ch. 140
(b) Gillespie v. Moon 2 John Ch. 588.
26 N.Y. 9.
(c) Wiltsie secs. 399. 401.
(d) Prouty v. Price 50 Barb. 344.
Lanson v. Barron 16 Hun. 414.
(e) Kendall v. Woodruff 87 N.Y. 1.
38 How. Pr. 156. 26 Hun. 148. 79 N.Y. 373.
(f) Dunning v. Leavitt 83 N.Y. 30.
(g) Skelton v. Scott 18 Hun. 373.
ject to the mortgage, and assumes and agrees to pay the same, is estopped from contesting its consideration or validity. (a)

A mortgagor in an action to foreclose may plead such set off as would be allowed in an action at law. (b) but such set off must be a debt due and payable at the commencement of the action. (c)

PROCEDURE—TRIAL. The trial of an action to foreclose a mortgage from commencement to the final judgment, is substantially the same as that of other actions tried by a court or referee. (d) A jury cannot be demanded as a matter of right, and the case is tried by the court unless a reference is ordered. (e)

If the defendant sets up in his answer a defense to the plaintiff's claim or to a part of it, the case must be tried and a decision obtained as to the issues presented. (f)

(a) Parkinsen v. Sherman 74. N.Y. 88.
    Trenton Rk Co v. Duncan 86. N.Y. 221.
(b) Code secs. 501, 507.
(d) Wiltsie sec. 466.
(e) Code secs. 968-969
(f) Baylies' Tr. Pr. 342.
The plaintiff, assuming that he is successful, should then apply for the appointment of a referee to compute the amount due him and any defendants, who are prior incumbrancers; (a) and upon the receipt and confirmation of the report of the referee, the court may direct the entry of the usual judgement of foreclosure and sale (b).

PRACTICE ON DEFAULT. If the defendants fail to answer within the time allowed by law, or the answer admits the rights of the plaintiff, he may apply for an order of reference. The referee so appointed is to ascertain the amount due the plaintiff and such defendants as are prior incumbrancers; and if but a portion of the amount is due, to determine whether the land can be sold in parcels. (c) The order of reference may be made ex parte, if no appearance has been made by any defendant but if any have appeared a notice of motion should be served upon them at least eight days before the hearing of the motion. (d) The motion is made upon the pleadings and affidavits stating the facts, which make the plaintiff entitled to the order. The referee having been appointed should compute the amount due on the mortgage, examine the the plaintiff or his agents, as to any payments made upon the debt, and take proof of facts and circumstances stated in the complaint. (e) And

(a) Balies' Tr Pr 341.
(b) Chamberlain v. Dempsey 36. N.Y. 144.
(c) Ct Rules 60. Wiltaie sec. 438.
(e) Ketcham v. Clark 22 Barb 319.
having done these things, he should make a report to the
court. This report should show the facts upon which
his conclusions are based and contain the proofs and
examinations had before him. His own conclusions will
be insufficient. (a) The report of the referee is
the basis for the final judgement and decree of sale.
It should be filed with the clerk, and becomes absolute
and confirmed in all things, unless exceptions thereto
are filed within eight days, after the service of notice
of filing the same. (b)

**RECEIVER.** In all cases, where the mortgaged premises
are but a slender and scanty security for the debt, and
the mortgagor or those personally liable are insolvent,
the mortgagee is entitled to have a receiver appointed
to take charge of the premises and of the rents and
profits. He should be a disinterested person and it
is his duty to take charge of the property pending the
litigation, preserve it from waste and destruction, re-
ceive the rents and profits and dispose of them under
the direction of the court. (c) In this manner a prior
lien is obtained upon the rents and profits, so that the
court may have power to direct their application to the
plaintiff's claim. (d) In this State a motion for a

(a) Wiltsie, sec. 458,
(c) 1 Sandif Ch. 183. Wiltsie, sec. 624.
(d) Porter v. Williams 9 N. Y. 142.
receiver must be made at a special term of the court, and
by a plaintiff in the action. (a) It is based upon the
complaint or on affidavits and cannot generally be made
ex parte. (b)

JUDGMENT. The plaintiff is entitled to move for
judgment as soon as the report of the referee has been
made. Notice of motion for judgment is indispensable.
The court cannot direct that upon the coming in of the
report of the referee, the same shall be confirmed and
the plaintiff have the usual judgment of foreclosure
and sale without further notice; nor can a plaintiff
have a contingent personal judgment against some of
the defendants before final judgment. (c) The judg-
ment of foreclosure is a final judgment not interlocu-
tory. (d) The Code provides that in an action to fore-
close a mortgage, if the plaintiff becomes entitled to
final judgment, it must direct a sale of the property
mortgaged or of such part of it, as is sufficient to
discharge the mortgage debt, the expenses of the sale, and
the costs of the action.' (e)

Code, sec. 713.
(b) 8. Paiges Ch. 373.
" " " 481.
Sup. Ct. Rule 60.
(d) Morris v. Morange 38 N.Y. 172.
(e) Code sec. 1626.
SALE. The sale must be made by the sheriff of the county, or some person duly designated and must be made in the manner prescribed in the decree of sale. He must attend at the time and place of sale, announce the terms of the sale, offer the premises to the highest bidder, make a memorandum of the sale signed by the purchaser, and if no persons appear to bid postpone the sale.

The Code provides that due notice of the time and place of holding the sale shall be publicly advertised for six successive weeks. Where the debt is not all due and the mortgaged property is so circumstanced that it can be sold in parcels, the final judgement must direct that only a portion be sold. (a)

Where the mortgagor has, since the execution of the mortgage, made transfers, at different times and to different persons, of separate parcels of the premises and upon foreclosure, what remains in him is insufficient to satisfy the mortgage, costs, and expenses, then the portions so disposed of must be sold in the inverse order of their alienation. (b) The plaintiff or any other party to the action may become a purchaser at such sale. (c)

The referee's report of the sale should state the amount of deficiency, but it is not necessary in New York to obtain an order confirming the report of sale before an execution can be issued to collect any deficiency specified in the report. (d)

(b) Bernhardt v. Lamburner 63 N.Y. 172.
(d) Moore v. Shaw 13 Hun 428 aff'd in 77 N.Y. 512.
A sale may be set aside, but some good reason must always be shown, as a general rule a sale made in good faith will not be disturbed. (a) The question, however is discretionary with the court and where a person's rights are injuriously affected it will be set aside. (b) Immediately upon the payment, by the purchaser of the purchase price, it is the duty of the officer conducting the sale to execute and deliver to him a deed of the premises, which by virtue of the Code (c) vests in him the same estate only that would have vested in the mortgagee if the equity of redemption had been barred. It is equivalent to a conveyance executed by the mortgagor and mortgagee, and is a complete bar against each of them, and against each party to the action, who was duly summoned, and against every party claiming from, through or under a party to the action, by title accruing after the filing of the notice of lis pendens.

Judgement for deficiency. All proceedings to collect any deficiency arising on the sale of mortgaged premises under a foreclosure are purely statutory. (d) The statute authorizing such a judgement in a foreclosure action in this State was enacted in order to confine all the proceedings for the collection of a mortgage debt to one court and one action. (e)

(b) Goodell v. Harrington 76 N.Y. 547 62 Barb. 280.
(c) Code sec. 1632.
(d) Wiltsie on Mortgage Foreclosure.
(e) Scofield v. Doecher 72 N.Y. 491.
The mortgagor in a foreclosure action can only claim to be credited on the mortgage debt, with the net proceeds of the sale, and he remains liable for any deficiency. The deficiency is determined by deducting from proceeds of the sale; the amount of taxes and other liens, expenses of the sale, and costs of the action.

It is the duty of the referee to report to the court any deficiency and the parties liable for its payment. (a) Upon the coming in of the report of the referee, from which the amount of the deficiency is ascertained, it is not necessary to apply to the court for judgment against the mortgagor for such deficiency. The execution may be issued directly upon the judgement of foreclosure. (b)

**SURPLUS.** 'If there is any surplus of the proceeds of the sale, after paying the expenses of the sale, and satisfying the mortgage debt, and the costs of the action, it must be paid into court for the use of the person or persons entitled thereto.' (c) Surplus is regarded as realty and goes to the heirs instead of the personal representatives. (d)

**COSTS.** In actions at law the prevailing side is entitled to costs, but in equity actions there is no hard and fast rule, costs are discretionary with the court.

(c) Code. sec 1633.
(d) Dunning v. Ocean Bank 61. N.Y. 497.
Costs and fees are, as a rule statutory, and where no statutory right to change or allow them exists, no legal or equitable right to do so can be presumed. (a) And where statutory costs do exist, courts have no authority to change them. The costs and fees allowed by statute in this State can be readily found by consulting the Code. (b) Under the Code the allowance of costs in equity cases stands on the same footing now that it did previous to its enactment. (c) The rules apply both to actions for strict foreclosure and to equitable actions to foreclose. (d)

(a) Willaie section 846.
(b) Code. sections 3228, 3229, 3230 and on.
(c) Law v. McDonald 9. Hun. 23.
(d) Bartow v. Cleveland. 7. Abb. Pr. 339.
Foreclosure by advertisement is exclusively and purely a statutory remedy. The right of the mortgagee to extinguish the equity of redemption, without judicial proceedings or decree of the court, depends in the first instance upon the existence of a power of sale in the mortgage. In the absence of a statute the mortgagee was obliged to conform to the directions given in the power of sale. The object of the statute is to regulate the manner of executing the power of sale.

At first the only requirement, in this State, was merely a notice of the sale by publication. (a) Later it was made necessary to serve notice personally on the mortgagor, (b) and still later it was required that a copy of the notice be filed with the county clerk. (c) And so, amended from time to time, the statute has expanded, until at the present time the entire proceeding of foreclosure by advertisement, is regulated to the minutest detail by the Code of Civil Procedure.

(a) 1.R.L.376.
(b) Chapter 346. Laws 1844.
(c) " 308. " 1857.

The economy of this method of foreclosure is its principal virtue, and is the usual reason for its use. Where, for instance, the property mortgaged is of too slight a value to cover the expenses of an action in addition to the amount due. (a) But it is a remedy not generally resorted to, for being a statutory, its proceedings are strictly construed and an error is fatal to the title. Every requirement of the statute must be strictly complied with, as any failure to do so will render the foreclosure irregular and void. (b)

The entire proceeding, to the merest detail is regulated by the sections of the Code, arranged in a systematic and compact form. (c) As these sections are so easily accessible, it is useless to quote them, for if quoted at all they should be quoted in full, which would require more space than this paper can afford. A brief outline of the proceeding is as follows,

Any mortgage upon real estate, within the State, containing a power of sale, may be foreclosed by advertisement, upon the default, which makes the power of sale operative. The assignee of a mortgage, or his executor or administrator, a surviving executor, or a foreign executor may foreclose. (d)

(a) Fiero Sp.Pro 472.
(b) Wiltsie sec. 766.
(c) Code secs. 2367 to 2409.
Demarest v. Wynkoop 3. John Ch. 129.
Notice of the sale must be given to all parties in the manner prescribed. A copy must be published weekly in a newspaper, of the county, for twelve weeks preceding the sale; Eighty four days before, a copy of the notice must be conspicuously posted, and another given to the county clerk, for filing. The mortgagee or his personal representatives, the wife or widow of the mortgagee, and all subsequent grantees and lienors, must be personally served with a copy of the notice.

The notice must contain the names of the parties; the date, time and place of recording; the sum claimed to be due or to become due; and a description of the mortgaged premises.

The sale must be made at public auction, in the day time, in the county in which the mortgaged premises are situated. It may be postponed from time to time, by observing certain formalities. Two or more distinct parcels of land should be sold separately. The mortgagee may himself be a purchaser at such a sale.

A sale made and conducted as prescribed is equivalent to a sale, pursuant to a judgement, in an action to foreclose, and is binding upon all parties. The purchaser acquires all the rights of the mortgagee and mortgagor. Affidavits of the proceedings must be made by proper parties, and are recorded in the office for recording deeds and mortgages, in the county, where the sale took place.

By virtue of the Code, a purchaser at a sale properly conducted, acquires his title there, against all persons bound by the sale, without the execution of a conveyance.
The costs and fees (a) allowed by law must be taxed by the clerk upon notice.

Any surplus, remaining after the payment of the mortgage, costs and expenses, must be paid into court.

These provisions of the Code, as they expressly state, do not affect any provisions of law, inconsistent therewith, especially relating to the foreclosure of mortgages to the people, or to the commissioners for loaning certain monies of the United States.

In closing, it may be repeated that foreclosure by advertisement is a cheap but precarious method, and because of the fatal results of irregularities in proceeding, is not generally resorted to.

(a) Code sections 2401, 2402.
By a strict foreclosure is the transfer of the entire estate mortgaged to the mortgagee. It was in early times the only method of foreclosure, but it is a severe remedy, looked upon with disfavor by the courts and now but rarely allowed.

In regard to it Chancellor Jones says (a) 'In early times when the mortgage was still regarded as a conditional sale of land, rather than a mere security for the payment of a debt, an adherence to the form of the condition, in the application of the remedy of the mortgagee, was natural, and would necessarily lead to a decree of strict foreclosure, requiring the mortgagor to perform the condition, or be forever barred and foreclosed of his right to redeem.

The effect would be that the mortgagee would take the land for the debt. In a country, where the laws do not permit the sale of real estate by execution for the satisfaction of debts, there might be some apology for preferring a foreclosure to a sale; but in modern times, when the more liberal principle has gained the ascendancy, which deals with the mortgage, as being in its substance and legal effect, a mere security, for the payment of the debt, and in this State, where lands of the debtor are subjected to sale for the satisfaction of
his debts, it would be strange indeed that a court of equity should be without power, to decree a sale of the mortgaged premises, for the satisfaction of the debt. and the mortgagee confined to a decree of strict foreclosure."

It is seriously questioned whether the provision of the Code (b) requiring that 'in a foreclosure action final judgment must direct a sale of the mortgaged premises' has not abolished strict foreclosure in this State. But from the cases, it seems that it has not been abolished, but is looked upon with great disfavor and will be granted only where justice can be done in no other way.

Such a foreclosure may be had, for instance, where a foreclosure has once been had, against the wife of the mortgagor, or some judgment creditor, or subsequent mortgagee or lienor, who was not made a party. (c)

(a) 9 Cow. 352.
(b) Code 1626.
(c) Dolles v. Duff 43 N.Y. 469, at 474.
Ross v. Boardman 22 Hun 527, at 531.
Hubbell v. Moulson 33 N.Y. 228, at 228-9
4 Paige 58.

Walter P. Cooke