

May 2013

Purchaser at Mortgage Foreclosure Sale--The Title He Acquires-- Effect of New Sections 500-a, 506-a and 506-b of the New York Real Property Law

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

St. John's Law Review (1951) "Purchaser at Mortgage Foreclosure Sale--The Title He Acquires--Effect of New Sections 500-a, 506-a and 506-b of the New York Real Property Law," *St. John's Law Review*. Vol. 26 : No. 1 , Article 20.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol26/iss1/20>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

promulgated thereunder should be deemed a misdemeanor. Willful refusal to serve when conscripted should be made a felony.

(8) The governor should be allowed to assume all of the duties and powers of all of the agencies under this Act *only* when an attack occurs or is imminent.¹¹¹

These specific proposals suggest themselves upon the face of the Act. They are not exclusive. Legislation of this nature, which gives the power to override all other laws save the Federal Constitution, statutes and regulations and the State Constitution deserves much more consideration than has been given to it. The problems which this bill attempts to solve are the most pressing questions ever presented in the state's history. There is need for a standing legislative committee to conduct extensive hearings on the situation to: secure the advice of recognized technological experts; study the action taken by other states and by Great Britain during the last war; invite remedial proposals from military and police officials, firemen, labor leaders, production heads, bar associations and other strata of our society who could presumably aid it in formulating improvements in the present Act. In this manner a deeper understanding of the absolute requisites to an effective defense mobilization could be obtained. As these requirements become properly defined, the legislature should use them as a basis for imposing limitations on the current broad powers of the defense agencies, which would allow them to carry out their duties effectively, but would at the same time provide the best protection possible for acknowledged civil liberties.¹¹²



PURCHASER AT MORTGAGE FORECLOSURE SALE—THE TITLE HE
ACQUIRES—EFFECT OF NEW SECTIONS 500-A, 506-A AND 506-B
OF THE NEW YORK REAL PROPERTY LAW

Introduction

A new amendment to the New York Real Property Law,¹ which has become effective September 1 of this year, has affected the mortgage foreclosure law of this state to a limited but noteworthy extent.

¹¹¹ See *Ex parte Merryman*, 17 Fed. Cas. No. 9487 (1861), and surrounding history as an illustration of the terrifying results possible from the residence of so much power in a single official, in that case: President Lincoln.

¹¹² During the last war, England's civil defense regulations were promulgated by the King in Council. However, it was mandatory to place all such regulations before Parliament, which body could void them within forty days. 2 & 3 GEO. VI, c. 31, § 88 (1939).

¹ N. Y. REAL PROP. LAW §§ 500-a, 506-a, 506-b. Added by Laws of N. Y. 1951, c. 610.

The new sections provide expedient means whereby purchasers at foreclosure sales may test the validity of interests threatening their title and clear certain defects which heretofore were not easily remedied. To what extent it is the policy of our law to encourage prospective purchasers to participate at foreclosure auctions, and to what extent these new statutory provisions square with such policy, are questions sought to be answered herein. A brief review of the history of foreclosure sale legislation and the purpose for which it was enacted will aid in establishing the legislative viewpoint.

Legislative Background

As far back as 1760, a colonial statute of New York provided for foreclosure of mortgages with judicial sale of the property. Sale, however, would only be used if the court saw fit.² Prior to that time, the mortgagee's remedy took the following form. Upon the default of the mortgagor, the mortgagee had an immediate right of entry. Equity then provided the mortgagor a right to redeem within a certain period. At the expiration of this time, the mortgagor's rights could be severed by strict foreclosure.³ During the period of grace, the property was inalienable because of the mortgagor's outstanding equity.⁴ Since the foreclosure action in those days was purely equitable,⁵ personal service of the mortgagor was required but was frequently difficult to obtain. Consequently, the 1760 statute, according to its preamble, was enacted because the rents of lands entered by mortgagees were in many cases not ". . . sufficient to answer the interest of monies for which the same are mortgaged . . ."; and because ". . . persons who have mortgaged their estates in this Colony frequently withdraw themselves beyond the seas . . . by means whereof no process out of the Courts of Equity can be served. . . ." ⁶ Thus, it may be seen that the motive for enacting this early statute was sympathy for the mortgagee.

Since those days, however, social policy has inclined to give greater aid to the mortgagor.⁷ Often told is the sad tale of the wicked banker who holds the mortgage on the poor widow's farm.⁸ The old system of strict foreclosure was severely criticized because frequently it permitted a mortgagee to satisfy the debt by taking property valued far in excess of the amount of his lien.⁹ In nearly all jurisdictions

² 4 COLONIAL LAWS OF NEW YORK 495 (Lyon, 1894).

³ See WALSH, A TREATISE ON MORTGAGES §§ 3, 65 (1934).

⁴ See Skilton, *Proposed Uniform Mortgage Legislation*, 9 AM. L. SCHOOL REV. 1128, 1129 (May 1941).

⁵ WALSH, *op. cit. supra* note 3, at 9.

⁶ 4 COLONIAL LAWS OF NEW YORK 495 (Lyon, 1894).

⁷ Skilton, *supra* note 4, at 1128.

⁸ See Sutherland, *Foreclosure and Sale, Some Suggested Changes in the New York Procedure*, 22 CORNELL L. Q. 216 (1937).

⁹ *Ibid.*; Skilton, *supra* note 4, at 1129.

today the old forms of procedure have been displaced by judicial sale.¹⁰ New York, by a statute in 1880, made sale compulsory in all ordinary foreclosure proceedings.¹¹ Possibly the legislature was then motivated by a desire to aid the mortgagee as in 1760. This seems unlikely, though, since by this time New York had abandoned the title theory of mortgages,¹² thus rendering obsolete the mortgagee's need for personal service.¹³

Another reason advanced for requiring foreclosure by sale was that it was regarded as the best method for determining the rights of all parties interested.¹⁴ If this be true, it is measurably rebutted by the existence of the very problems which induced the enactment of the subject legislation.

It seems apparent that the main purpose of judicial sale in mortgage foreclosure actions today is the attempt to realize the maximum price for the mortgagor on the sale of his premises.¹⁵ Commensurate with this purpose is the encouragement of competitive bidding at the sale.¹⁶ However, it is discouraging to note that today few sales are attended by competitive bidders.¹⁷ To state that the legislative purpose favors unlimited encouragement of bidding is fallacious. Certainly at present there is little inducement indicated by the statutory requirements of advertisement by notice of sale.¹⁸ By requiring the foreclosing mortgagee to purchase large amounts of advertising space in the real estate sections of daily newspapers, a greater number of purchasers might readily be obtained, but any measures which would increase foreclosure costs meet with severe criticism,¹⁹ since, in the long run, the mortgagor must bear the burden of foreclosure costs. Although it is argued that mortgage defalcation should be discouraged and that prospects of a substantial surplus money recovery might tend to encourage defalcation, it is submitted that statutory policy in this state generally favors the attempted recovery of a reasonable surplus for the mortgagor, proportional to his equity in the defaulted property.

¹⁰ WALSH, *op. cit. supra* note 3, at 278.

¹¹ Laws of N. Y. 1880, c. 178, § 1626.

¹² WALSH, *op. cit. supra* note 3, at 21.

¹³ Under the lien theory today, foreclosure action is in the nature of an action in rem. 8 CARMODY'S NEW YORK PRACTICE 646 (2d ed. 1933).

¹⁴ OSBORNE, MORTGAGES 922 (1951).

¹⁵ Vaughan, *Reform of Mortgage Foreclosure Procedure*, 88 U. OF PA. L. REV. 957 (1940) *passim*; Sutherland, *supra* note 10, *passim*.

¹⁶ In conducting a foreclosure sale under New York statutes, the auctioneering officer must endeavor to obtain a maximum price. 8 CARMODY, *op. cit. supra* note 13, at 80.

¹⁷ Sutherland, *supra* note 8, at 217.

¹⁸ The statutory requirements are contained in N. Y. CIV. PRAC. ACT §§ 712, 713. See also 8 CARMODY, *op. cit. supra* note 13, at 74.

¹⁹ Sutherland, *supra* note 8, *passim*.

The Prospective Purchaser

The layman bidder at a foreclosure sale, be he the mortgagee himself or another, is interested in purchasing nothing short of "the lots" or "the house." If he has had experience as a purchaser he realizes that along with the house or lots, he frequently buys trouble.²⁰ In determining the amount of his bid, he therefore will consider the possible expenses he may incur should the property bring such trouble. The technical name for trouble is defective title. An intelligent purchaser must anticipate the possibilities of title defects and weigh them against available remedies.

At the foreclosure sale, a successful bidder has the privilege of leaving a deposit in lieu of immediate purchase. He then may take a reasonable time within which to search title.²¹ A smart bidder will search very carefully, and if possible, obtain title insurance since the title which is granted by the referee's deed is without warranties.²² The purchaser may reject his bid on grounds of unmarketability. Rejection has been allowed for numerous types of defects, an adequate consideration of which would fill many pages.²³ Generally stated, the successful bidder may reject his bid in any instance where the title may probably involve a lawsuit to determine its validity.²⁴

At this point it may be argued that the prospective purchaser is not deterred by the possibility of obtaining a bad title since, as has been seen above, he may reject it when defects appear upon search. In practice, however, a purchaser will frequently accept a doubtful title—even purchase it without searching title—in the following instances:

- (1) Since the court must review and approve objections to title,²⁵ involving expense and delay, a purchaser will often accept a defective title and take his chances of clearing the defect. This attitude is further promoted by the fact that the court will not relieve for minor defects.²⁶
- (2) The usual foreclosure sale is attended by but two people, the referee and the attorney for the mortgagee.²⁷ The at-

²⁰ "It is practically a foregone conclusion in some jurisdictions that technical flaws will be found in titles acquired through judicial sales." Note, 35 GEO. L. J. 376 (1947).

²¹ See WILTSIE, MORTGAGE FORECLOSURE 910 *et seq.* (4th ed. 1927). Sections 711 to 755 and 769 to 818 in this text contain a thorough study of the rights of a purchaser at foreclosure sale. See also WALSH, *op. cit. supra* note 3, §§ 75, 76.

²² See note 36 *infra*.

²³ WILTSIE, *op. cit. supra* note 21, at 913 *et seq.*; WALSH, *op. cit. supra* note 3, at 305 *et seq.*; 8 CARMODY, *op. cit. supra* note 13, § 119; see Note, 59 C. J. S. 1421 (1949).

²⁴ WALSH, *op. cit. supra* note 3, at 308.

²⁵ 8 CARMODY, *op. cit. supra* note 13, at 97.

²⁶ *Ibid.*; WALSH, *op. cit. supra* note 3, at 308.

²⁷ Sutherland, *supra* note 8, at 217.

torney will bid in the property at the minimum amount which he thinks will be approved by the court.²⁸ Our prospective competitive bidder may appear at these sales and outbid the attorney, though aware of possible title defects, if his chances of clearing the defects appear good. While the price remains at a bargain level, neither the mortgagee nor his competitor care about minor expenses in clearing title.

- (3) If the mortgagee, bidding the amount of his lien or less, becomes the successful bidder, he will accept title immediately without search, since if the title be defective he stands to lose nothing.²⁹
- (4) A title which has once been rejected for a legitimate defect may, upon proper readvertisement, be resold.³⁰ A purchaser at such resale, aware of the defect, will likewise be encouraged by brighter prospects of clearing title.

It is thus seen that a purchaser who will reject his bid is the exception rather than the rule. From the above examples, it is apparent that very often a purchaser will gamble on clearing title. It is submitted, therefore, that bidders at foreclosure sales will very frequently be influenced by the prospects of clearing title defects. Hence, they should be quite interested in the new remedies afforded by the subject statutes. In order to determine how much weight should be given the new remedies, it will first be necessary to outline the possible defects which may arise.

The Title Acquired

An exhaustive consideration of the possible problems facing a purchaser who has accepted a referee's deed in foreclosure would fill a good sized volume.³¹ It will be attempted here merely to present a general classification of the interests which may be hostile to the purchaser's title.

²⁸ "The court, by reason of its control over its own judgments . . . has a wide discretion on an application to set aside a foreclosure sale and to order a resale." 8 CARMODY, *op. cit. supra* note 13, § 875. Unless the purchase price is so low as to shock the conscience of the court, the sale will not be set aside. *Masiazek v. Roberts*, 211 App. Div. 417, 207 N. Y. Supp. 621 (4th Dep't 1925). Cf. N. Y. CIV. PRAC. ACT § 1083. Where the market value of the property foreclosed is greater than the amount of the mortgage, a mortgagee will often bid the amount of his lien. This is so since Section 1083 prevents a mortgagee from obtaining a deficiency judgment where the market value of the property sold at the sale exceeds the total of liens against the property. For a consideration of this effect, see Vaughan, *supra* note 15, *passim*.

²⁹ Assuming that the mortgagee's sole recourse is upon the property, he can not better his situation by rejecting his bid.

³⁰ 8 CARMODY, *op. cit. supra* note 13, at 931; 59 C. J. S. § 739 (1949).

³¹ See note 21 *supra*.

A bid at the sale is an offer, which, if accepted by the auctioneer, becomes a contract³² to purchase that which is offered in the terms of sale.³³ A purchaser, therefore, agrees to take title subject to any encumbrances mentioned therein. Section 986 of the New York Civil Practice Act requires that the terms of sale mention any outstanding rights of dower, charges or liens against the property. The terms of sale must also conform to the judgment of foreclosure.³⁴ The referee sells only those interests joined in the action,³⁵ and neither he nor the court makes any warranties of title.³⁶

Thus, when a purchaser accepts the referee's deed he accepts a bundle of legal rights which may or may not amount to absolute title. The rights included in the sale, assuming that the foreclosure action was valid in all respects, are the following:

- (a) The rights of the mortgagor in the property as of the date of the original mortgage.³⁷
- (b) The rights of the mortgagee in the property, likewise, as of the date of the original mortgage.³⁸
- (c) Any other rights foreclosed in the action which may include:³⁹
 - (1) rights junior to the mortgage.⁴⁰
 - (2) certain rights senior to the mortgage, such as:
 - (A) rights of disputed priority, settled in the action.⁴¹
 - (B) senior liens joined in the action and satisfied thereby.⁴²

³² WALSH, *op. cit. supra* note 3, at 305.

³³ 8 CARMODY, *op. cit. supra* note 13, at 928.

³⁴ Luker v. Fitzer, 107 Misc. 308, 177 N. Y. Supp. 559 (Sup. Ct. 1919); *see* Ehrich v. Ehrich, 122 Misc. 216, 217, 202 N. Y. Supp. 357, 358 (Sup. Ct. 1923).

³⁵ N. Y. CIV. PRAC. ACT § 1085.

³⁶ WALSH, *op. cit. supra* note 3, at 314.

³⁷ N. Y. CIV. PRAC. ACT § 1085; WALSH, *op. cit. supra* note 3, at 313; 59 C. J. S. § 759 (1949).

³⁸ Robinson v. Ryan, 25 N. Y. 320 (1862); Winslow v. Clark, 47 N. Y. 261 (1872); WALSH, *op. cit. supra* note 3, at 315.

³⁹ *See* WILTSIE, *op. cit. supra* note 21, §§ 401-407.

⁴⁰ N. Y. CIV. PRAC. ACT § 1085; Rector v. Mach, 93 N. Y. 488 (1883); Dorf v. Bornstein, 277 N. Y. 236, 14 N. E. 2d 51 (1938).

⁴¹ Whipple v. Edelstein, 148 Misc. 681, 266 N. Y. Supp. 127 (Sup. Ct. 1933).

⁴² Jacobie v. Mickel, 144 N. Y. 237, 39 N. E. 66 (1894). Prior encumbrancer, if served and made a party to the action, must appear. He may either decline to have his rights adjudicated, or may allow the settlement but if he does not appear, he defaults as was done in this case. *See* Clark v. Fuller, 136 Misc. 151, 239 N. Y. Supp. 269 (Sup. Ct. 1930).

The purchaser's title may be void or voidable as to the following classes of interests:

- (a) Rights junior to the mortgage toward which the foreclosure action was defective.⁴³
- (b) Rights senior to the mortgage [excluding those joined and foreclosed or satisfied in the action].⁴⁴

Since the purchaser has notice of the foreclosure judgment in the terms of sale,⁴⁵ he cannot be heard to complain against the foreclosing plaintiffs that they failed to join a necessary defendant.⁴⁶ Against unjoined interests junior to the mortgage, therefore, the purchaser must apply the remedies he acquired by subrogation to the rights of the mortgagee.⁴⁷

As to outstanding rights senior to the mortgage, the purchaser has no remedy.⁴⁸ With the possible exception of fee interests, these rights were required to have been mentioned in the terms of sale. Outstanding senior fee interests are a matter of record and it has been held that a bona fide purchaser at foreclosure sale takes precedence over unrecorded fee interests.⁴⁹

*Remedies*⁵⁰

As has been stated, the purchaser at foreclosure sale succeeds to the rights and remedies of the foreclosing mortgagee. He thereby acquires the remedy of reforeclosure which he may exercise against any interest neglected by the original mortgagee.⁵¹ Section 1082 of the New York Civil Practice Act permits the purchaser, when applying the above remedy to a junior mortgagee and other junior lienors, to obtain from the court foreclosure without resale (strict foreclosure) upon the encumbrancer's failure to redeem within a certain period. This remedy, however, is not available against an owner of a fee

⁴³ *Herrmann v. Cabinet Land Co.*, 217 N. Y. 526, 112 N. E. 476 (1916).

⁴⁴ *WALSH, op. cit. supra* note 3, at 285.

⁴⁵ See note 34 *supra*.

⁴⁶ A purchaser buys subject to the terms of sale. See note 33 *supra*.

⁴⁷ See note 38 *supra*.

⁴⁸ *WALSH, op. cit. supra* note 3, at 314.

⁴⁹ *Ibid.*

⁵⁰ Much of the material in this section is taken from the Recommendations of the Law Revision Commission. See 1951 LEG. DOC. NO. 65(K), 1951 REPORT, N. Y. LAW REVISION COMMISSION.

⁵¹ See note 38 *supra*. The Association of the Bar of the City of New York disapproved of the subject statutes before they were enacted. It was felt that another proposed bill would better remedy the situation by tolling the operation of Section 47-a and thus preventing any statute of limitation bar to a purchaser's action to reforeclose. No consideration was made, however, of the effect of the proposed bill (now the subject statutes) other than in regard to the situation created by Section 47-a. N. Y. BAR ASS'N LEGIS. BULL. 59 (Feb. 19, 1951).

interest in the property.⁵² Reforeclosure with a resale would be necessary.

By the enactment of Section 47-a of the New York Civil Practice Act in 1938, an action on a mortgage must be commenced within six years from its accrual.⁵³ In the case of *McDonald v. Daly*, a foreclosure sale purchaser, attempting to reforeclose under Section 1082 eleven years after the first foreclosure and twelve years after the cause had accrued, was held to be barred by Section 47-a.⁵⁴ The anomalous situation resulting was as follows. A purchaser, buying property at foreclosure sale would go into possession, make improvements and settle down. Several years later, should a person toward whom the original foreclosure action was defective challenge the title of the peaceful purchaser, the latter might find that his remedy of reforeclosure was barred by Section 47-a. He would, therefore, be defenseless against such claim and might be subject to ejection.

This situation was noted in a recommendation for legislation in the *New York University Law Quarterly Review* in 1948.⁵⁵ The ordinary defect in a purchaser's title was either a mere technicality of foreclosure procedure or such an insignificant adverse interest that the adverse party would seldom press the claim. The result was that the purchaser's title remained unmarketable until such adverse claim became barred by the fifteen-year ejection statute of limitation.⁵⁶ The harshness of this situation was realized by the Law Revision Commission and remedied by the subject legislation.⁵⁷

The remedies provided by the new sections of the New York Real Property Law,⁵⁸ while correcting the above situation, are far more inclusive. It should be noted that the remedy provided therein is available ". . . to determine the right of any person to set aside such judgment, sale or conveyance (in lieu of foreclosure) or to enforce an equity of redemption or to recover possession of the property, or the right of any junior mortgagee to foreclose a mortgage."⁵⁹ It is available to a purchaser at a foreclosure sale, to a mortgagee who takes a deed in lieu of foreclosure, or to the designee of such mortgagee. The remedy is available even though an action to foreclose

⁵² See *Moulton v. Cornish*, 138 N. Y. 133, 33 N. E. 842 (1893).

⁵³ N. Y. CIV. PRAC. ACT § 47-a, "An action upon . . . a mortgage of real property, or any interest therein, must be commenced within six years after the cause of action has accrued."

⁵⁴ 190 Misc. 136, 71 N. Y. S. 2d 546 (Sup. Ct. 1947).

⁵⁵ Comment, 23 N. Y. U. L. Q. REV. 501.

⁵⁶ N. Y. CIV. PRAC. ACT §§ 34, 46.

⁵⁷ See note 50 *supra*.

⁵⁸ The new Section 500-a states that it applies to purchasers at foreclosure sale under foreclosure pursuant to both Article 65 of the New York Civil Practice Act, and Article 17 of the New York Real Property Law. Article 17 provides for foreclosure procedure where the mortgage contains a power of sale. Its procedure is rigid, technical, and little used. See Sutherland, *supra* note 8, at 216.

⁵⁹ N. Y. REAL PROP. LAW § 500-a.

the original mortgage would be barred by the statute of limitation.⁶⁰

In the situation noted above, caused by the six-year limitation in Section 47-a, the purchaser's right to reforeclosure was barred. Reforeclosure, however, was only available to the purchaser against parties toward whom the original foreclosure might be defective, to wit, interests junior to the mortgage and other interests permitted to be joined therein. Note, however, that the new remedy is available to determine the right of *any person* to recover possession of the property or to exercise an equity of redemption. This wording would seem to include interests senior to the mortgage as well as junior interests. In its recommendations, the Law Revision Commission points out that reforeclosure is inadequate despite any question of the statute of limitations since it ". . . will not decide whether the original proceedings were defective so as to render the title of the purchaser void or voidable."⁶¹

The remedy itself is an action brought under Article 15 of the New York Real Property Law, entitled "Action To Compel The Determination Of A Claim To Real Property." It was added in 1920 upon recommendation of the Law Revision Commission to enlarge and supplement preexisting equitable remedies for quieting title.⁶² With it a person in possession may bring an action to compel an adverse claimant to try his claim as if such claimant were himself suing in an ejectment action.⁶³ The new amendments make that remedy available to purchasers at foreclosure sale and a mortgagee or his designee taking a deed in lieu of foreclosure, Section 47-a notwithstanding.

The new Section 506-a requires the court to direct an accounting, "as justice requires," in an action brought under Section 500-a. Such accounting shall cover items such as rents, profits, or the value of the use and occupation of the land, and would represent an adjustment between the parties according to the determination by the court of the rights of each.

The new Section 506-b provides the forms of judgment in an action under Section 500-a. The judgment of the court may:

1. Foreclose or reforeclose pursuant to Article 65 of the New York Civil Practice Act.
2. Grant strict foreclosure after a fixed time for redemption has elapsed.

⁶⁰ *Ibid.* "Such action may be maintained even though an action against the defendant to foreclose the mortgage under which the judgment, sale or conveyance was made, or to extinguish a right of redemption, would be barred by the statutes of limitation."

⁶¹ See note 50 *supra*.

⁶² See Note, 49 (Pt. 2) MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED 478.

⁶³ 1943 LEG. DOC. No. 65(G), 1943 REPORT, N. Y. LAW REVISION COMMISSION.

If foreclosure or reforeclosure is ordered with sale pursuant to Article 65, the court *may* include in the amount of the judgment the value of any improvements made subsequent to the original foreclosure or conveyance in lieu thereof. If strict foreclosure is ordered the court *must* add to the redemption amount the value of any such improvements. The amendment also contains appropriate saving clauses which limit the effective dates of the sections in order not to infringe upon pre-existing rights.

What now is the resultant situation? In so far as his subrogation to the rights of the foreclosing mortgagee is concerned, the purchaser may feel secure. Under the new sections if the defect in the original proceedings was occasioned in good faith, reforeclosure will be granted. This remedy is efficient and in some cases strict foreclosure will be available against a fee owner.

Adverse interests, apparently senior to the purchaser's rights, may now be tested and a speedy determination made. On the whole, the new sections seem to provide the purchaser with a readily available, efficient method for him to eliminate summary defects to his title, and to test the validity of the more important adverse interests.

Suppose, however, that in testing the validity of a more serious adverse interest the court discovers in that party an outstanding equity of redemption. Suppose further that the adverse party exercises redemption. Suppose the purchaser had paid at the sale a considerable surplus over the mortgage debt and, further, that the value of the property in question had doubled since the time of the foreclosure sale. In such a case, a determination of rights under the new statute would do the purchaser little good. In short, the new statute does nothing to remedy a situation where an exercisable outstanding equity of redemption may cause a purchaser serious loss.

Another problem still facing the prospective purchaser is that of undiscovered senior fee owners. The claims of such persons might well be determined to be valid. As an example, assume that the original mortgagor was not the sole owner of the property but had merely a tenancy in common with another.⁶⁴ If that other person's title was recorded but missed by all subsequent parties (improbable but possible), the purchaser would have serious difficulty settling with him should the adverse claimant press his claim before the fifteen-year statute had run.

Suppose also that the original terms of the foreclosure sale were improperly drawn and a dower interest or a senior lien was omitted.⁶⁵ The purchaser's recourse upon the court or referee or foreclosing mortgagee is at least doubtful.⁶⁶

⁶⁴ WALSH, *op. cit. supra* note 3, at 314.

⁶⁵ *Cf. People v. Hazen*, 132 Misc. 639, 230 N. Y. Supp. 585 (Sup. Ct. 1928). Purchaser at foreclosure sale takes subject to rights of tax deed holder who was not a party to the foreclosure action.

⁶⁶ *Elmont Cemetery, Inc. v. Northprince Boulevard Holding Co.*, 266 App. Div. 785, 41 N. Y. S. 2d 525 (2d Dep't 1943). Herein, a purchaser discovered

It may be answered that a mortgagor who suffered senior encumbrances or co-interests in his fee should not be aided by efforts to attain for him surplus monies. From the standpoint of encouraging purchasers in an attempt to aid mortgagors in general, this argument fails. It is still, however, a very strong argument that a reasonable search of title would probably reveal these last mentioned defects. As noted previously, however, situations will occur wherein a purchase will be made subject to such defects.

Conclusions

It is the policy of New York law and that of most jurisdictions today to encourage bidding at judicial foreclosure sale in an effort to recover for the defaulted mortgagor a reasonable amount in surplus monies. The new amendments, Sections 500-a, 506-a and 506-b, have provided valuable remedies which are readily available toward the clearing of defects in the title to property bought at foreclosure sale. Since the prospect of poor title has had a discouraging influence on prospective purchasers, the new sections should provide added inducement to them. There remain, however, a few dissuasive aspects of the problem still facing the purchaser; one of them is the possibility of an unanticipated redemption resulting in a loss equal to the amount of surplus bid. A purchase at foreclosure sale today is a speculative investment. Speculators pay speculative prices and that means little or no surplus monies.

On the other hand, we cannot offer to sell to the prospective purchaser any more rights than were owned by the mortgagor in default,⁶⁷ since if we do so we must infringe upon the rights of parties not in default. The trouble lies in the fact that the rights of a party in default are not a readily salable item.

It may be argued, also, that it is senseless to dispute any particular phase of New York foreclosure procedure on the policy level, since the entire procedure is outmoded. The fact remains, however, that we have been using the existing procedure for over a century with very little change and very little prospect of change.⁶⁸ It would seem sensible that we strive, as has been done by the framers of the subject statute, to aid in carrying out existing policy with the best means available. While it is true that today mortgage defalcation is not as common as it was two decades ago, it is also true that because of a current inflationary economy, the average mortgagor in default today has a greater equity in his property, part of which our laws should attempt to regain for him in surplus monies.

a number of years after the sale that a tax item had not been satisfied. The terms of sale stated that the purchaser was to report to the referee any taxes to be satisfied. *Held*, not having done so in a timely manner no recourse is now available.

⁶⁷ 1 GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES 38 (Rev. ed. 1940).

⁶⁸ Sutherland, *supra* note 8, *passim*.