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GENERAL STATUTES

OF THE
STATE OF MINNESOTA

As Amended by Subsequent Legislation, with which are Incorporated
All General Laws of the State in Force December 31, 1894

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CHAPTER 81.

FORECLOSURE OF MORTGAGES.

See curative acts, §§ 7588-7629.

1. Foreclosure by Advertisement, §§ 6028-6056.
2. Foreclosure by Action, §§ 6057-6076.

TITLE 1.

FORECLOSURE BY ADVERTISEMENT.¹

§ 6028. Foreclosure by advertisement—Limitation.

Every mortgage of real estate, heretofore or hereafter executed, containing therein a power of sale, upon default being made in any condition of such mortgage, may be foreclosed by advertisement within fifteen years after the maturing of such mortgage or the debt secured thereby, in the cases and in the manner hereinafter specified.

(1878, c. 53, § 1; G. S. 1878, c. 81, § 1; as amended 1879, c. 21, § 1.)

For act violating foreclosure of mortgage made to a partnership in the firm's name, see § 7590.

Chapter 121, Gen. Laws 1877, was unconstitutional so far as it assumed to abolish foreclosures under powers of sale in mortgages executed before its passage. *O'Brien v. Krenz*, 36 Minn. 136, 30 N. W. Rep. 458.

Where a mortgagee, foreclosing under the power, complies with the requirements of the statute, it is sufficient, although there may be additional requirements contained in the mortgage. *Butterfield v. Farnham*, 19 Minn. 85, (Gil. 53.)

Where an instrument is in effect several separate and distinct mortgages upon several separate lots to secure several separate and distinct sums, although, for convenience, all are consolidated in one writing, a sale of all the lots together as one tract, for a gross sum, is unauthorized and void. *Hull v. King*, 38 Minn. 349, 37 N. W. Rep. 792.

A mortgage with power of sale "agreeably to the statute in such case made and provided," made in April, 1877, when no such statute was in force, held a valid common-law power, capable of being executed, and that the contract is not impaired by the retrospective action of Laws 1878, c. 53, as to the mode of executing such powers. *Webb v. Lewis*, 45 Minn. 285, 47 N. W. Rep. 803.

Laws 1871, c. 52, limiting time for foreclosing mortgages by advertisement, and excepting mortgages already foreclosed or attempted to be foreclosed, was not invalid as partial or class legislation. *Cobb v. Bord*, 40 Minn. 479, 42 N. W. Rep. 396.

§ 6029. Same—Requisites.

To entitle any party to give a notice, as hereinafter prescribed, and to make such foreclosure, it is requisite:

First. That some default in a condition of such mortgage has occurred, by which the power to sell has become operative.

Second. That no action or proceeding has [been] instituted at law to recover the debt then remaining secured by such mortgage, or any part thereof; or if the action or proceeding has been instituted, that the same has been discontinued, or that an execution upon the judgment rendered therein has been returned unsatisfied in whole or in part.

Third. That the mortgage containing such power of sale has been duly recorded, and if it has been assigned, that all the assignments thereof have been recorded.

(1878, c. 53, § 2; G. S. 1878, c. 81, § 2.)

SUBD. 3. A mortgage on lands in two counties, but recorded in only one, may be foreclosed under the power as to the lands in that county. *Balme v. Wambaugh*, 16 Minn. 116, (Gil. 106.)

¹This title of G. S. 1866 having been, with the exceptions of §§ 3, 4, 9, 11, 14, 15, 17, repealed by Laws 1877, c. 121, its provisions were substantially re-enacted in "An act to provide for the foreclosure of mortgages on real estate by advertisement," approved March 7, 1878. See §§ 6028-6052.

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A mortgage with but one witness, which has been legalized by a curative act, but the registration of which has not been legalized, cannot be foreclosed by advertisement. *Ross v. Worthington*, 11 Minn. 438, (Gil. 323.) After the registration of such a mortgage is legalized by a curative act, it may be foreclosed by advertisement. *Id.*

A false and impossible particular, added to the description, by mistake of the register, in recording a deed, does not vitiate the record. *Thorwarth v. Armstrong*, 20 Minn. 464, (Gil. 419.)

What error in the record will defeat the foreclosure, see *Thorp v. Merrill*, 21 Minn. 386.

Under the provisions of this section, subd. 3, it was necessary that an assignment of a mortgage, to enable the assignee to foreclose by advertisement, should be in writing. *Morrison v. Mendenhall*, 18 Minn. 232, (Gil. 212.)

A guardian of a minor heir cannot, without an assignment of record, foreclose by advertisement a mortgage owned by the deceased ancestor of the minor. *Miller v. Clark*, (Mich.) 23 N. W. Rep. 35.

See, also, *Bolles v. Carli*, 12 Minn. 113, (Gil. 62.)

A foreign administrator does not hold by "assignment." *Holcombe v. Richards*, 33 Minn. 38, 35 N. W. Rep. 714.

After execution, delivery and record of a quitclaim deed, the legal effect of which is to release the mortgage of record, the mortgagee cannot foreclose by advertisement. *Benson v. Markoe*, 41 Minn. 112, 42 N. W. Rep. 787.

If the assignment has not been properly acknowledged, so as to entitle it to record, the foreclosure is a nullity. *Lowry v. Mayo*, 41 Minn. 338, 43 N. W. Rep. 78.

A person cannot legally foreclose by advertisement when the record title to the mortgage is in another. *Backus v. Burke*, 48 Minn. 260, 51 N. W. Rep. 284; *Burke v. Backus*, 51 Minn. 174, 53 N. W. Rep. 458.

§ 6030. Foreclosure for instalments of principal or interest.

When a mortgage is given to secure the payment of money by instalments, each of the instalments, either of principal or interest, mentioned in such mortgage, may be taken and deemed to be a separate and independent mortgage for each of such instalments, may be foreclosed in the same manner, and with like effect, as if such separate mortgage was given for each of such subsequent instalments; and a redemption of any such sale by the mortgagor shall have the like effect as if the sale for such instalments had been made upon an independent mortgage.

(1878, c. 53, § 3; G. S. 1878, c. 81, § 3.)

This section only authorized a separate foreclosure for instalments falling due subsequent to the first instalment of indebtedness secured by a mortgage, and the foreclosure under such chapter, for the first instalment of mortgage indebtedness, is void. *Shorts v. Cheadle*, 8 Minn. 67, (Gil. 44.) Where a mortgage, payable in instalments, was foreclosed for the first instalment, and the owner of the land redeemed from that foreclosure, the redemption merely annulled the sale for that instalment, leaving the mortgage to stand, as to the other instalments, as though the first instalment had been paid, and the mortgagee may foreclose for such subsequent instalments. *Daniels v. Smith*, 4 Minn. 172, (Gil. 117.)

Foreclosure for one instalment exhausts the lien of the mortgage on the land sold. There can be a second sale to satisfy a subsequent instalment only when land remains unsold on the first sale. *Fowler v. Johnson*, 26 Minn. 338, 3 N. W. Rep. 987, and 6 N. W. Rep. 486; *Standish v. Vosberg*, 27 Minn. 175, 6 N. W. Rep. 489. Cf. *Watkins v. Hackett*, 20 Minn. 106, (Gil. 92.)

See, also, *Brown v. Delaney*, 22 Minn. 349.

The holder of overdue coupon interest notes may sue to foreclose, although the principal debt is not yet due, and is held by another, who is made a party. *Cleveland v. Booth*, 43 Minn. 16, 44 N. W. Rep. 670.

§ 6031. Same—What may be sold to pay instalments.

In such case, if the mortgaged premises consist of separate and distinct farms or tracts, only such tract or tracts shall be sold as are sufficient to satisfy the instalment then due, with interest and costs of sale; but if said premises do not consist of such separate and distinct farms or tracts, the whole shall be sold; and, in either case, the proceeds of such sale shall, after satisfying the interest, portion or instalment of the principal due, with interest and costs of sale, be applied towards the payment of the residue of the sum secured by said mortgage, and not due and payable at the time of such sale; and if such residue does not bear interest, such application shall be made with a rebate of the legal interest for the time during which the residue shall not be

due and payable; and the surplus, if any, shall be paid to the mortgagor, his legal representatives or assigns.

(1878, c. 53, § 4; G. S. 1878, c. 81, § 4.)

Where several notes maturing at different dates, secured by one mortgage, are assigned to different parties at different times, and the proceeds of the mortgaged property are insufficient to pay all in full, such proceeds should, in the absence of any contract for a different order, be applied *pro rata* towards the payment of all the notes, without regard to the time they matured, or the order as to time in which they were assigned. *Wilson v. Eigenbrodt*, 30 Minn. 4, 13 N. W. Rep. 907.

§ 6032. Notice of sale—Publication—Service on occupant.

Notice that such mortgage will be foreclosed by sale of the mortgaged premises, or some part of them, shall be given by publishing the same for six successive weeks, at least once in each week, in a newspaper printed and published in the county where the premises intended to be sold, or some part thereof, are situated, if there is one, if not, then in a newspaper printed and published in an adjoining county, if there is such a newspaper; if there is not, then in a newspaper printed and published in the county to which the county in which the premises are located is attached for judicial purposes, if there be such a newspaper; if there is not, then in a newspaper printed and published at the capital of the state. In all cases, a copy of such notice shall be served in like manner as summons in civil actions in the district court, at least four weeks before the time of sale, on the person in possession of the mortgaged premises, if the same are actually occupied. Proof of such service may be made, certified and recorded in the same manner as proof of publication of a notice of sale under a mortgage.

(1878, c. 53, § 5; G. S. 1878, c. 81, § 5.)

A mortgagee being dead, a foreclosure by advertisement upon a notice of sale purporting to be given by authority of the mortgagee, is void; nor could it be cured by proof that in fact the notice was given by authority of another person. *Bausman v. Kelley*, 38 Minn. 197, 36 N. W. Rep. 333.

Followed in *Welsh v. Cooley*, 44 Minn. 446, 46 N. W. Rep. 908.

In case of a void foreclosure in the name of a deceased mortgagee, the mortgagor may be estopped, by acquiescence and abandonment of the land to the incumbancers, to question the right of bona fide purchasers under the foreclosure. *Bausman v. Fane*, 45 Minn. 412, 43 N. W. Rep. 13; *Bausman v. Eads*, 46 Minn. 148, 43 N. W. Rep. 769.

The addition of "agent of A. B." to the name of a mortgagee in a mortgage of real estate does not take away his character of mortgagee. And where there is such addition in the mortgage, signing a notice of foreclosure sale with the name of the mortgagee, the addition, "agent for A. B.; A. B., mortgagee in fact," is harmless. *Menard v. Crowe*, 20 Minn. 448, (Gil. 402.)

In computing time for publishing notice of sale under a power in a mortgage, the general rule prescribed by the statute of excluding the first and including the last day is to apply; thus, a notice first published on the 3d of August, and published to and including the 14th of September, is sufficient. *Worley v. Naylor*, 6 Minn. 192, (Gil. 123.) Where the notice was required to be published once in each week for six successive weeks, and there were seven weekly publications, the first on January 4th, and the last on February 15th, for a sale February 23d, it was held good. *Atkinson v. Duffy*, 16 Minn. 45, (Gil. 30.)

A notice of foreclosure sale, otherwise regular, the last publication of which was on October 16th, for a sale on October 26th, is good. *Goenen v. Schroeder*, 18 Minn. 66, (Gil. 52.)

A mortgagee, who has commenced the publication of a notice of sale, may, before the time fixed for the sale in the first notice, discontinue it, and publish and sell under a new notice, provided no person interested is misled by the change. *Banning v. Armstrong*, 7 Minn. 46, (Gil. 31.)

A statutory foreclosure is effectual as to the mortgagor (in possession of a part of the land mortgaged, but not residing upon it) who was duly served with notice of foreclosure sale, as required by statute, notwithstanding the fact that another person, occupying as his tenant a dwelling house and stable upon the mortgaged premises, was not served with such notice. *Holmes v. Crummett*, 30 Minn. 23, 13 N. W. Rep. 924.

Where a foreclosure by advertisement is made upon an illegal notice of sale, the mortgagor may have the sale set aside, or he may recover damages against the mortgagee for the injury he has suffered by the unauthorized sale. *Lowell v. North*, 4 Minn. 32, (Gil. 15.) That the sale was upon illegal notice; that in consequence thereof the property sold for less than its value; and that, had the sale been duly made, the property would have brought sufficient to satisfy the mortgage debt,—show a right to recover by the mortgagor, and, when pleaded in a suit by the mortgagee to recover a deficiency left after the sale, constitute a good defense. It is no answer to the mortgagor's defense that he might redeem. *Id.* The allegation that the notice of sale was not

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published in a newspaper printed in the county where the mortgaged premises were situated, nor in the nearest paper in one of the adjoining counties, sufficiently shows that the sale was illegal. *Id.*

Publication in religious newspapers. *Hull v. King*, 38 Minn. 349, 37 N. W. Rep. 792. See *Coles v. Yorks*, 28 Minn. 464, 467, 10 N. W. Rep. 775.

When a mortgage with power of sale covers several separate, distinct tracts of land, lying in different counties, the notice of foreclosure sale need be published only in a newspaper in any one of such counties. *Paulle v. Wallis* (Minn.) 59 N. W. Rep. 999.

Foreclosure held void for failure to serve notice on plaintiff, a junior mortgagee in possession. *Casey v. McIntyre*, 45 Minn. 526, 48 N. W. Rep. 402.

The notice may be served by the mortgagee. *Kirkpatrick v. Lewis*, 46 Minn. 164, 47 N. W. Rep. 970, and 48 N. W. Rep. 783.

The notice may be served by leaving a copy at the house of the usual abode of the person actually in possession, with a person of suitable age and discretion then resident therein. *Groff v. National Bank of Commerce*, 50 Minn. 348, 52 N. W. Rep. 934.

Who is of "suitable age and discretion." *Temple v. Norris*, 53 Minn. 286, 53 N. W. Rep. 133.

What constitutes occupancy. *Moulton v. Sidle*, 52 Fed. Rep. 616.

§ 6033. Requisites of notice of sale.

Every notice shall specify—

First. The names of the mortgagor and of the mortgagee, and the assignee, if any.

Second. The date of the mortgage, and when and where recorded. (As amended 1883, c. 24, § 1.)

Third. The amount claimed to be due thereon, and taxes, if any, paid by the mortgagee at the date of the notice.

Fourth. A description of the mortgaged premises, conforming substantially to that contained in the mortgage. And,

Fifth. The time and place of sale.

(1878, c. 53, § 6; G. S. 1878, c. 81, § 6; amended as supra.)

SUBD. 1. An administrator, foreclosing, by advertisement, a mortgage executed to his intestate, need not, in the notice, state the death and his own appointment. If he subscribe the notice as administrator, it is good. *Baldwin v. Allison*, 4 Minn. 25, (Gil. 11.)

As to the foreclosure of a mortgage to a partnership in the firm name. *Menage v. Burke*, 43 Minn. 211, 45 N. W. Rep. 155.

If after the first, and before the last, publication, there is put on record an assignment of a part interest in the mortgage to one whose name is not signed to the notice, a sale pursuant to such notice is invalid. *Dunning v. McDonald*, 54 Minn. 1, 55 N. W. Rep. 864.

SUBD. 2. A notice of foreclosure sale, which does not state when the mortgage was recorded, though it states in what office, book, and page, is insufficient. *Martin v. Baldwin*, 30 Minn. 537, 16 N. W. Rep. 449.

See *Burke v. Backus*, cited in note to § 6029.

SUBD. 3. In stating the amount claimed to be due in the notice of sale, an excess of trifling amount, arising from a mere error of computation, would not be deemed material; but if the amount claimed is largely in excess of what the terms of the contract or any legitimate calculation based thereon will justify, the sale will be void. *Spencer v. Annan*, 4 Minn. 542, (Gil. 426.) Where a notice of sale under a power in a mortgage claims to be due more than is actually due, if the excess is not of sufficient magnitude to have influenced purchasers, the sale will not be set aside for that reason. *Ramsay v. Merriam*, 6 Minn. 168, (Gil. 104.) The omission to date a notice of sale, under the power in a mortgage, does not vitiate the sale. *Id.* In the absence of fraud in law or fact, or of actual injury, the claim in the notice of foreclosure sale of more than is legally due, or stipulated for in the contract, does not invalidate the foreclosure. In this case an excess of \$7,335.64 in a claim of \$34,251.28 was held not to invalidate the foreclosure. *Butterfield v. Farnham*, 19 Minn. 85, (Gil. 53.)

Where the amount claimed in the notice is within the literal terms of the note secured, that it is greater than is legally due, no fraud or injury appearing, does not affect the validity of the foreclosure. *Menard v. Crowe*, 20 Minn. 448, (Gil. 402.)

An excessive claim will not invalidate the sale unless it appears that it was made with a fraudulent purpose, or that the mortgagor is injured. *Bowers v. Hechtman*, 45 Minn. 238, 47 N. W. Rep. 792.

Where the notice claims an amount greater than allowed by the terms of the mortgage, and the mortgagee bids in for that amount, he is liable for the excess. *Fagan v. Peoples' Sav. & Loan Ass'n* (Minn.) 57 N. W. Rep. 142. But, if the excessive claim and bids were founded on mistake, the mortgagee may be allowed equitable relief. *Lane v. Holmes* (Minn.) 57 N. W. Rep. 132.

Where the instrument is in effect a separate mortgage on each lot described to secure a separate sum, the notice must state the amount due on each lot separately.

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Mason v. Goodnow, 41 Minn. 9, 42 N. W. Rep. 482; Bitzer v. Campbell, 47 Minn. 221, 49 N. W. Rep. 691; Child v. Morgan, 51 Minn. 116, 52 N. W. Rep. 1127.

See, also, Hull v. King, 38 Minn. 349, 37 N. W. Rep. 792.

A notice which states the amount claimed due for principal and interest, and that the premises will be sold to pay such debt and interest "and taxes, if any, on said premises," is good. Kirkpatrick v. Lewis, 46 Minn. 164, 47 N. W. Rep. 970, and 48 N. W. Rep. 783.

SUBD. 4. A slight variance in the description from that in the mortgage held not fatal. Schoch v. Birdsall, 48 Minn. 441, 51 N. W. Rep. 352.

See, also, Bottineau v. Aetna Life Ins. Co., 31 Minn. 125, 16 N. W. Rep. 849.

SUBD. 5. A notice of foreclosure sale designating the place as "in front of the office of the register of deeds, in the county of Fillmore," the county being referred to in the notice as in the state of Minnesota, sufficiently designates the place of sale. Merrill v. Nelson, 18 Minn. 366, (Gil. 335.) Designating the place of sale in a foreclosure under the power as "at the court-house, in the city of St. Paul," is sufficient, in the absence of evidence of fraud or unfairness, or actual or probable injury. Golcher v. Brisbin, 20 Minn. 453, (Gil. 407.) "At the front door of the court-house, in the city of St. Paul," is a sufficient designation of the place of sale in a foreclosure notice. Thorwarth v. Armstrong, 20 Minn. 464, (Gil. 419.)

The omission of the hour of sale in a foreclosure notice does not vitiate the sale; it having been fairly conducted at the usual hour for such sales, and there being no fraudulent intent and no injury. *Id.* Where a notice of foreclosure is proper in other respects, the omission to designate an hour for the sale is, at most, only an irregularity which, after the lapse of twelve years, will not be permitted to overthrow the sale. Menard v. Crowe, 20 Minn. 448, (Gil. 402.)

Application of description—Sufficiency of designation of place of sale. Johnson v. Cocks, 37 Minn. 530, 35 N. W. Rep. 436.

A sale 15 minutes before the hour named held void. Richards v. Finnegan, 45 Minn. 208, 47 N. W. Rep. 788.

§ 6034. Sale, how and by whom made.

The sale shall be at public vendue, between the hours of nine o'clock in the forenoon and the setting of the sun, in the county in which the premises to be sold, or some part thereof, are situated, and shall be made by the sheriff of the said county, or his deputy, to the highest bidder.

(1878, c. 53, § 7; G. S. 1878, c. 81, § 7.)

The sheriff of a county attached to another for judicial purposes is the proper officer to conduct a foreclosure sale of lands in his county, under a power of sale in the mortgage. Berthold v. Holman, 12 Minn. 335, (Gil. 221.)

§ 6035. Postponement of sale.

Such sale may be postponed from time to time, by inserting a notice of such postponement, as soon as practicable, in the newspaper in which the original advertisement was published, and continuing such publication until the time to which the sale is postponed, at the expense of the party requesting such postponement.

(1878, c. 53, § 8; G. S. 1878, c. 81, § 8.)

A mortgage sale, under the power, may, before the day advertised for the sale, be postponed to another day. Bennett v. Brundage, 8 Minn. 432, (Gil. 335.)

Where the notice, as first published, stated that the sale would take place on the 23d day of May, and it was afterwards changed, so as to state that it would take place on the 25th day of May, and the mortgagor was misled by it, so as to lose his opportunity to be present at the sale, held, that the sale was void. Dana v. Farrington, 4 Minn. 433, (Gil. 336.)

The mortgagee cannot charge the costs of a postponement at his request to the mortgagor. Hobe v. Swift (Minn.) 59 N. W. Rep. 831.

§ 6036. Sale in separate tracts.

If the mortgaged premises consist of separate and distinct farms or tracts, they shall be sold separately, and no more farms or tracts shall be sold than are necessary to satisfy the amount due on such mortgage at the date of notice of such sale, with interest, taxes paid, and costs of sale.

(1878, c. 53, § 9; G. S. 1878, c. 81, § 9.)

Two distinct tracts touching only at a corner, if they constitute but one farm, may, on foreclosure, be sold as one tract. Merrill v. Nelson, 18 Minn. 366, (Gil. 335.)

Upon foreclosure of a mortgage, under a power of sale in it, authorizing a sale of the whole property on default, a sale of the whole is regular, though a sale of less than the whole might satisfy the debt. Johnson v. Williams, 4 Minn. 260, (Gil. 183.) But where

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the value of the whole property greatly exceeds the amount of the debt, a court of equity will, on application of the mortgagor, or his representatives, confine the sale to such part of the land as will be sufficient to satisfy the debt. *Id.*

Upon a mortgage of one tract of land, although the mortgagor subsequently conveys a part of it, the mortgagee may, in foreclosing under the power, sell the land as one tract. *Paquin v. Braley*, 10 Minn. 379, (Gil. 304.)

Where a mortgagee, foreclosing under power, has once sold the land, he cannot sell it again under the power. *Id.*

A sale of separate tracts in one parcel is not void, but only voidable for good cause shown, as fraud, or prejudice to the mortgagor or owner of the equity. *Willard v. Finnegan*, 42 Minn. 476, 44 N. W. Rep. 985; *Ryder v. Hulett*, 44 Minn. 353, 46 N. W. Rep. 559; *Clark v. Kraker*, 51 Minn. 444, 53 N. W. Rep. 706.

See *Abbott v. Geck*, 35 Minn. 499, 29 N. W. Rep. 194.

§ 6037. Mortgagee, etc., may purchase.

The mortgagee, his assignees, or his or their legal representatives, may fairly and in good faith purchase the premises so advertised, or any part thereof, at such sale.

(1878, c. 53, § 10; G. S. 1878, c. 81, § 10.)

Where, in foreclosure of a mortgage under a power, the sale is made by the sheriff or any third person, the mortgagee may, under § 9, c. 75, Comp. St., become the purchaser; not otherwise. *Ramsey v. Merriam*, 6 Minn. 168, (Gil. 104;); *Allen v. Chatfield*, 8 Minn. 435, (Gil. 336.)

See, also, *Wilson v. Bell*, 17 Minn. 61, (Gil. 40.)

§ 6038. Certificate of sale—Acknowledgment and record.

Whenever any sale of real property is made under a power of sale contained in any mortgage, the officer shall make, and deliver to the purchaser, a certificate, under his hand and seal, containing—

First. A description of the mortgage under which such sale is made;

Second. A description of the real property sold;

Third. The price paid for each parcel sold separately;

Fourth. The date of the sale, and the name of the purchaser; and

Fifth. The time allowed by law for redemption.

Said certificate shall be executed, proved or acknowledged, and recorded, as required by law for a conveyance of real estate, within twenty days after such sale.

(1878, c. 53, § 11; G. S. 1878, c. 81, § 11.)

See curative acts, §§ 7595-7607.

A certificate of mortgage sale sufficiently describes the mortgage by referring to a copy of the notice of sale contained in it which correctly describes the mortgage. *Golcher v. Brisbin*, 20 Minn. 453, (Gil. 407.)

Title does not pass unless there is a certificate of sale. *Smith v. Buse*, 35 Minn. 234, 28 N. W. Rep. 220.

The statute in force at the time of the foreclosure prescribing no time within which the certificate should be recorded, a record 10 months after sale held sufficient. *Ryder v. Hulett*, 44 Minn. 353, 46 N. W. Rep. 559.

Certificate under Laws 1862, c. 19, § 3, held valid as against the objection that it did not accurately describe the mortgage or the debt. *Cable v. Minneapolis Stock-Yards & Packing Co.*, 47 Minn. 417, 50 N. W. Rep. 528.

§ 6039. Certificate, when to operate as a conveyance.

Such certificate, so proved, acknowledged and recorded, shall, upon the expiration of the time for redemption, operate as a conveyance, to the purchaser or his assignees, of all the right, title and interest of the mortgagor in and to the premises named therein, at the date of such mortgage, without any other conveyance whatever.

(1878, c. 53, § 12; G. S. 1878, c. 81, § 12.)

As to the interest of the purchaser during the year of redemption. *Cooper v. Finke*, 33 Minn. 2, 35 N. W. Rep. 469.

The purchaser is not entitled to the rents during the year of redemption, though the mortgage pledges them. *Pioneer Savings & Loan Co. v. Farnham*, 50 Minn. 315, 52 N. W. Rep. 897; *McDowell v. Hillman*, 50 Minn. 319, 52 N. W. Rep. 897.

See *Buchanan v. Reid*, 43 Minn. 172, 175, 45 N. W. Rep. 11.

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§ 6040. Sheriff—Execution of certificate after expiration of term of office.

That in all cases where any sheriff or any deputy sheriff of any county in this state has heretofore and during his term of office duly sold any real property under a power of sale contained in a mortgage authorizing such sale, and such term of office has expired before the execution of a certificate and affidavit of sale by such officer, he shall, nevertheless, at any time within three months after the expiration of such term of office, be and he is hereby authorized to execute and deliver such certificate and such affidavit in the same manner and with the same effect as if he were still in office. Provided, however, that nothing herein contained shall apply to any action now pending in any court in this state involving the validity of any such sale.

(1893, c. 158, § 1.2)

§ 6041. Redemption by mortgagor, etc.—Interest.

The mortgagor, his heirs, executors, administrators or assigns, whose real property is sold in conformity to the provisions of this act, may, within twelve months after such sale, redeem such property as hereinafter provided, by paying the sum of money for which the same was sold, together with interest on the same from the time of such sale: provided, that no redemption shall be made for real property sold in conformity to the provisions of this act, when the mortgage foreclosed contains a distinct rate of interest more than seven per cent. per annum, unless the party entitled to redeem shall pay, within the time provided, the sum for which said property was sold, together with interest thereon, from the date of sale to the time of redemption, at the rate specified in the mortgage, not to exceed ten per cent. per annum; provided, that when no rate of interest is specified in the mortgage, the rate of interest after sale shall be seven per cent. per annum on the amount for which the property was sold.

(1878, c. 53, § 13; G. S. 1878, c. 81, § 13.)

This section, so far as it applies to mortgages with powers executed prior to its passage, and requires to be paid for redemption from sales under the powers in such mortgages a greater rate of interest than that required to be paid on such redemption by the laws in force at the time of executing such mortgages, impairs their obligation, and is void. *Hillebert v. Porter*, 28 Minn. 496, 11 N. W. Rep. 84.

The act of March 10, 1860, amending the act of July 29, 1858, regulating the foreclosure of mortgages, the terms of redemption, and the rights of the mortgagor to the possession after sale, so far as it applies to sales made under the power of sale contained in a mortgage, affects the contract; and, as to mortgages executed prior to its passage, it impairs the obligation of the contract, and is void. *Heyward v. Judd*, 4 Minn. 483, (Gil. 375.)

Upon a foreclosure under the power in a mortgage executed prior to the act of March 10, 1860, there is only one year in which to redeem. In the act of July 29, 1858, which gives one year to redeem, the clause "or such other time as may be prescribed by law," as applied to a mortgage executed while that act was in force, does not authorize an act changing the time to redeem, as it would impair the obligation of contracts. *Goenen v. Schroeder*, 8 Minn. 387, (Gil. 344.)

The law as to the time for redemption, in force at the execution of a mortgage, controls in case of a foreclosure under the power. *Carroll v. Rossiter*, 10 Minn. 174, (Gil. 141.)

The time for redemption stated in the certificate of sale, on a foreclosure under the power, does not affect the right as fixed by law. *Id.*

Sale and redemption under a power are governed by the law in force when the mortgage was executed. *Smith v. Green*, 41 Fed. Rep. 455.

On a foreclosure under the power in a mortgage, the purchaser gets no title till the time to redeem expires. *Donnelly v. Simonton*, 7 Minn. 167, (Gil. 110.)

See *Beal v. White*, 28 Minn. 6, 7, 8 N. W. Rep. 829; *Hospes v. Saaborn*, 28 Minn. 48, 49, 3 N. W. Rep. 905.

A junior mortgagee is not an "assign," within this section, and is not entitled to redeem within the year. *Cullerier v. Brunelle*, 37 Minn. 71, 33 N. W. Rep. 123.

See note to § 6046.

The purchaser at the foreclosure of a junior mortgage is not an "assign." *Buchanan v. Reid*, 43 Minn. 172, 45 N. W. Rep. 11.

² An act authorizing sheriffs and deputy sheriffs to complete foreclosure sales after the expiration of their term of office. Approved March 3, 1893.

Where the last day of the year from the confirmation is Sunday, the last day for the owner to redeem is Monday. *Bovey De Laittre Lumber Co. v. Tucker*, 48 Minn. 223, 50 N. W. Rep. 1038.

The owner must redeem within the year. *Gates v. Ege*, (Minn.) 59 N. W. Rep. 495.

§ 6042. Redemption—How made.

Redemption shall be made as follows: The person desiring to redeem shall pay to the person holding the right acquired under such sale, or for him to the sheriff who made the sale, or his successor in office, the amount required by law for such redemption, and shall produce to such person or officer—

First. A certified copy of the docket of the judgment, or the deed of conveyance or mortgage, or of the record or files evidencing any other lien under which he claims a right to redeem, certified by the officer in whose custody such docket, record, or files shall be.

Second. Any assignment necessary to establish his claim, verified by the affidavit of himself or the subscribing witness thereto, or of some person acquainted with the signature of the assignor. And,

Third. An affidavit of himself or his agent, showing the amount then actually due on his lien.

Within twenty-four hours after such redemption is made, the party redeeming shall cause the documents so required to be produced to be filed in the office of the register of deeds of the county in which the mortgaged lands are situated, and the register of deeds shall indorse thereon the date and hour of receiving the same, and shall preserve such documents in his office for one year thereafter, for which service he shall be entitled to receive one dollar: *provided*, that in case such redemption shall be made at any place other than the county seat, it shall be deemed a sufficient compliance herewith to forthwith deposit such documents in the nearest post-office, addressed to such register of deeds, with the postage thereon prepaid.

(1878, c. 53, § 14; G. S. 1878, c. 81, § 14; as amended 1881, Ex. S. c. 3, § 1.)

Where a party seeks to redeem, he need not produce to the sheriff all the deeds constituting his claim of title from the mortgagor in the foreclosed mortgage. *Nopson v. Horton*, 20 Minn. 268, (Gil. 239.)

If, on application to redeem, the sheriff receive, without objection, United States treasury notes and current national bank notes, it is a good payment. *Id.*

The sheriff, in receiving money paid on redemption, acts as the officer of the law, not as the agent of the party. *Horton v. Maffitt*, 14 Minn. 239, (Gil. 217.)

The money is in his hands as sheriff, and so not subject to levy, though, when tendered by him, the party for whom it is paid refuses to receive it. *Davis v. Seymour*, 16 Minn. 210, (Gil. 184.)

The mortgagee need not produce the writings by which the note was transferred and retransferred, without any assignment of the mortgage. *Wilson v. Hayes*, 40 Minn. 531, 42 N. W. Rep. 467.

None but subsequent redemptioners can take advantage of the failure to file the documents with the register. *Id.*; *Sardeson v. Menage*, 41 Minn. 314, 43 N. W. Rep. 66.

Production of the original records of the documents showing right to redeem is sufficient. *Sardeson v. Menage*, *supra*.

Redemption held good, though payment made by check. *Id.*

If the sheriff accepts a sum sufficient to satisfy the purchaser's claim, the redemption is good, and the shortage, if any, must be deducted from the sheriff's fees. *Bovey De Laittre Lumber Co. v. Tucker*, 48 Minn. 223, 50 N. W. Rep. 1038.

§ 6043. Certificate of redemption—Contents—Acknowledgment and record—Effect of redemption.

The person or officer from whom such redemption is made, shall make, and deliver to the person redeeming, a certificate under his hand and seal, containing—

First. The name of the person redeeming, and the amount paid by him on such redemption;

Second. A description of the sale for which such redemption is made, and of the property redeemed; and

Third. Stating upon what claim such redemption is made, and, if upon a lien, the amount claimed to be due thereon at the date of redemption.

Such certificates shall be executed, and proved or acknowledged, and re-

recorded, as provided by law for conveyances of real estate; and if not so recorded within ten days after such redemption, such redemption and certificate is void as against any person in good faith making redemption from the same person or lien. If such redemption is made by the owner of the property sold, his heirs or assigns, such redemption annuls the sale; if by a creditor holding a lien upon the property or any part thereof, said certificate, so executed, and proved or acknowledged, and recorded, operates as an assignment to him of the right acquired under such sale, subject to such right of any other person to redeem as is or may be provided by law.

(1878, c. 53, § 15; G. S. 1878, c. 81, § 15.)

The purchaser cannot question the bona fides of a subsequent mortgage by the owner. *Bovey De Laitre Lumber Co. v. Tucker*, 48 Minn. 223, 50 N. W. Rep. 1038.

Confession of judgment to enable creditor to redeem held not a fraud on the purchaser. *Atwater v. Manchester Sav. Bank*, 45 Minn. 341, 48 N. W. Rep. 137.

The failure of the certificate to state the amount claimed to be due will not defeat the right of a subsequent redemptioner. *Todd v. Johnson*, 50 Minn. 310, 52 N. W. Rep. 864; *id.*, 57 N. W. Rep. 320.

§ 6044. Redemption by creditors—Notice.

If no such redemption is made, the senior creditor having a lien, legal or equitable, on the real estate, or some part thereof, subsequent to the mortgage, may redeem within five days after the expiration of the said twelve months; and each subsequent creditor, having such lien, within five days after the time allowed all prior lien-holders, as aforesaid, may redeem by [paying] the amount aforesaid, and all liens prior to his own held by the party from whom the redemption is made: provided, that no creditor shall be entitled to redeem, unless, within the year allowed for redemption, he files notice of his intention to redeem in the office of the register of deeds where the mortgage is recorded.

(1878, c. 53, § 16; G. S. 1878, c. 81, § 16.)

A creditor of the mortgagor acquiring a lien pending the time for redemption from a foreclosure is entitled to redeem, and a redemption by him operates as an assignment of the rights of the purchaser. *Watkins v. Hackett*, 20 Minn. 106, (Gil. 92.)

A second mortgagee is a "creditor having a lien" within this section. *Nopson v. Horton*, 20 Minn. 268, (Gil. 239.) A second mortgagee may redeem from the foreclosure of a prior mortgage without paying to the purchaser, though he was the mortgagee, money paid by him after the sale to redeem the land from tax sale. *Id.*

A creditor of a mortgagor's grantee, having a lien on the land mortgaged, has the same right to redeem from a foreclosure as though he were a creditor of the mortgagor. *Hospes v. Sanborn*, 28 Minn. 48, 8 N. W. Rep. 905.

The rule in *Pamperin v. Scanlan*, 28 Minn. 345, 9 N. W. Rep. 863, and *Parke v. Hush*, 29 Minn. 434, 13 N. W. Rep. 668, that the holder of the purchaser's interest cannot tack a junior lien to it for the purpose of redemption without redeeming from himself by virtue of the junior lien, followed. *Buchanan v. Reid*, 43 Minn. 172, 45 N. W. Rep. 11.

The purchaser at the foreclosure of a junior mortgage is "a creditor having a lien." *Id.*

See, also, *Tinkcom v. Lewis*, cited in notes to §§ 5472, 5474; *Martin v. Sprague*, 29 Minn. 53, 11 N. W. Rep. 143; *Sprague v. Martin*, 29 Minn. 226, 229, 13 N. W. Rep. 34; *Cullerier v. Brunelle*, cited in note to § 6041.

Redemption by a creditor, after tender of his debt, is good against the mortgagor. *Willard v. Finnegan*, 42 Minn. 476, 44 N. W. Rep. 955.

An attaching creditor is entitled to redeem. *Atwater v. Manchester Sav. Bank*, 45 Minn. 341, 48 N. W. Rep. 137.

The purchaser waives any defect in the notice by accepting the money paid on redemption. *Todd v. Johnson*, 50 Minn. 310, 52 N. W. Rep. 864.

The assignee of a subsequent mortgagee may redeem under a notice given by such mortgagee. *Bovey De Laitre Lumber Co. v. Tucker*, 48 Minn. 223, 50 N. W. Rep. 1038.

Where a junior redemptioner redeemed from a senior creditor who had redeemed, the redemption was valid, though such senior creditor had no valid lien. *Todd v. Johnson* (Minn.) 57 N. W. Rep. 320.

§ 6045. Interest of purchaser is subject to legal process against him.

The interest acquired upon any such sale is subject to the lien of any attachment or judgment duly made or docketed against the person holding the same, as in case of real property, and may be attached or sold on execution in the same manner.

(1878, c. 53, § 17; G. S. 1878, c. 81, § 17.)

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§ 6046. Disposal of surplus purchase money.

If, after sale of any real estate, made as herein prescribed, there remains in the hands of the officer making the sale any surplus money, after satisfying the mortgage on which such real estate was sold, and payment of the tax and cost of sale, the surplus shall be paid over by said officer, on demand, to the mortgagor, his legal representatives or assigns.

(1878, c. 53, § 18; G. S. 1878, c. 81, § 18.)

A second mortgagee, in preference to the mortgagor, is entitled to receive the surplus money arising from the foreclosure sale under a prior mortgage. *Brown v. Crookston Agricultural Ass'n*, 34 Minn. 545, 26 N. W. Rep. 507.

See *Cuillerier v. Brunelle*, 37 Minn. 71, 33 N. W. Rep. 123.

A junior mortgagee is an "assign" within the meaning of this section. *Fuller v. Langum*, 37 Minn. 74, 33 N. W. Rep. 122. See note to § 6041.

Where, upon the foreclosure under the power of the first of two mortgages on the same real estate to different mortgagees, the owner of the land demanded and received from the sheriff making the sale the surplus of the money made on the foreclosure over what was due on the mortgage foreclosed, and costs, and eight years afterwards the second mortgagee sued the owner for the surplus so paid to him, held, the right of action was barred by lapse of time. *Ayer v. Stewart*, 14 Minn. 97, (Gil. 68.)

§ 6047. Perpetuating evidence of publication and sale.

Any party desiring to perpetuate the evidence of any sale made in pursuance of the provisions of this chapter, may procure—

First. An affidavit of the publication of the notice of sale, and of any notice of postponement, to be made by the printer of the newspaper in which the same was inserted, or by some person in his employ knowing the facts; and

Second. An affidavit of the facts of any sale pursuant to such notice, to be made by the person who acted as an auctioneer at the sale, stating the time and place at which the same took place, the sum bid, and the name of the purchaser, which affidavit may be taken and certified to by any officer authorized by law to administer oaths.

(1878, c. 53, § 19; G. S. 1878, c. 81, § 19.)

See §§ 7538-7629.

The affidavits of the printer and sheriff, required to be made on a foreclosure by advertisement, are presumptive evidence of the facts contained in them. *Griswold v. Taylor*, 8 Minn. 342, (Gil. 301.)

The sheriff's certificate of sale, and also his deed, on foreclosure under the power, were, by § 10, c. 75, Comp. St., evidence of a sale. *Goenen v. Schroeder*, 18 Minn. 66, (Gil. 51.)

See *Sanborn v. Petter*, 35 Minn. 449, 29 N. W. Rep. 64.

§ 6048. Same—Record of affidavits.

Such affidavit shall be recorded at length by the register of deeds of the county in which the premises are situated, in a book kept for the record of deeds; and such original affidavits, the record thereof, and certified copies of such record, shall be presumptive evidence of the facts therein contained.

(1878, c. 53, § 20; G. S. 1878, c. 81, § 20.)

§ 6049. Same—Duty of register.

A note referring to the page and book where the evidence of any sale having been made under a mortgage is recorded, shall be made by the register recording such evidence, in the margin of the record of such mortgage, if such record is in his office.

(1878, c. 53, § 21; G. S. 1878, c. 81, § 21.)

§ 6050. Same—Effect of record to pass title.

A record of the affidavits herein provided, and of the certificates executed on the sale of the premises, shall be sufficient to pass the title thereto; and the said conveyance shall be an entire bar of all claims or equity of redemption of the mortgagor, his heirs and representatives, and of all persons claiming under him or them, by virtue of any title subsequent to such mortgage, except as herein provided.

(1878, c. 53, § 22; G. S. 1878, c. 81, § 22.)

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§ 6051. Affidavit of costs, etc., to be filed with register of deeds.

That within ten days after foreclosure of any mortgage under the provisions of this act, the party foreclosing, or his attorney shall make and file for record with the register of deeds in the county where the property is located, an affidavit of costs and disbursements, setting forth in full a detailed bill of the costs and disbursements, including attorneys' fees embraced in the foreclosure sale, and that the same has been absolutely and unconditionally paid or incurred.

(1878, c. 53, § 23; G. S. 1878, c. 81, § 23; as amended 1889, c. 101, § 1.)

The omission to file the affidavit does not affect the validity of the sale. *Johnson v. Cocks*, 37 Minn. 530, 35 N. W. Rep. 436.

§ 6052. Recovery by mortgagor of excessive costs or interest.

That the mortgagor, his heirs or assigns, at any time within one year after foreclosure, may recover from the owner of the mortgage at the time of foreclosure three times the amount of any costs or disbursements not absolutely paid for said foreclosure, and three times the amount of any bonuses or interest over and above twelve per cent, embraced in said foreclosure, and for which the property was sold, unless said overplus has been paid to the mortgagor or his assigns.

(1878, c. 53, § 24; G. S. 1878, c. 81, § 24.)

The action given by this section may be brought as soon as the property is in fact sold on the foreclosure, without waiting for the expiration of the time to redeem. Laws 1879, c. 66 (§ 2212 et seq.), does not repeal this section. *Beal v. White*, 25 Minn. 6, 3 N. W. Rep. 329.

In an action to recover treble damages for making excessive charges, the burden is on the plaintiff to show how much the charge exceeded what was reasonable and proper. *Hobe v. Swift* (Minn.) 59 N. W. Rep. 831.

Right of mortgagor to recover from the holder of the mortgage three times the amount of excessive charges. *Id.*

The good faith of the mortgagee is not a defense unless the sums charged are absolutely paid. *Id.*

§ 6053. Foreclosure by foreign executors, etc.

Any executor or administrator duly appointed in any other state or country may foreclose by advertisement any mortgage of land in this state, belonging to the estate represented by him, in the same manner, and under like restrictions, as a resident, appointed in this state, may do: provided, that before commencing any such foreclosure, an authenticated copy of his appointment as such executor or administrator is filed for record in the office of the register of deeds of the county in which such foreclosure is to be commenced.

(1876, c. 41, § 1; G. S. 1878, c. 81, § 25.)

For acts validating foreclosures by foreign executors, see §§ 7588, 7589.

Exercise of power of sale by foreign administrator. *Holcombe v. Richards*, 33 Minn. 38, 35 N. W. Rep. 714.

§ 6054. Sheriff's certificate of sale as evidence—Limitation.

That the sheriff's certificate of any sale, heretofore or hereafter made, under a power to sell contained in a mortgage, shall be *prima facie* evidence that all the requirements of law in that behalf have been duly complied with, and *prima facie* evidence of title in fee thereunder in the purchaser at such sale, his heirs or assigns, after the time for redemption therefrom has expired; and no such sale shall be held invalid or set aside by reason of any defect in the notice thereof, or in the publication or posting of such notice, or in the proceedings of the officer making such sale, unless the action in which the validity of such sale shall be called in question be commenced, or the defense alleging its invalidity be interposed, within five years after the date of such sale: *provided*, that persons under disability to sue by reason of being minors, insane persons, idiots, persons in captivity, or in any country with which the United States are at war, when such sale was made, may commence such action or

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interpose such defense at any time within five years after the removal of such disability: *provided, further*, that such actions shall be commenced with reasonable diligence in all cases.

(1883, c. 112, § 1; G. S. 1878, v. 2, c. 81, § 26a.)

This statute is inapplicable to a foreclosure which was void by reason of total absence of authority to exercise the power of sale, as where a stranger has assumed to foreclose. *Bausman v. Kelley*, 38 Minn. 197, 36 N. W. Rep. 333.

The certificate, to be evidence, must conform in matters of substance to the requirements of the statute. *Nelson v. Central Land Co.*, 35 Minn. 403, 29 N. W. Rep. 121.

Where title is made under a mortgage and a foreclosure, pursuant to the powers in it, this section does not make the certificate of sale proof of the mortgage and power. *Anderson v. Schultz*, 37 Minn. 76, 33 N. W. Rep. 440.

Proof considered as overcoming any *prima facie* evidence of the regularity of the notice which may attach to the sheriff's certificate by virtue of this section. *Sanborn v. Petter*, 35 Minn. 449, 29 N. W. Rep. 64.

The certificate is *prima facie* evidence that the requirements in respect to publication of notice were complied with. *Burke v. Lacock*, 41 Minn. 250, 42 N. W. Rep. 1016. This statute applies to certificates made prior to Laws 1862, c. 19. *Id.*

"Sheriff's certificate" includes a certificate executed by a deputy. *Id.*

Under foreclosure in 1858, defective by reason of insufficient publication, the purchaser went into possession in 1883, and so continued till commencement of action in 1889. In ejectment by a grantee of the mortgagor subsequent to the mortgage, held, that the right to recover was barred by this statute. *Russell v. H. C. Akeley Lumber Co.*, 45 Minn. 376, 48 N. W. Rep. 3.

See, also, *Mogan v. Carter*, 54 Minn. 141, 55 N. W. Rep. 1117.

This statute is valid, at least as applied to cases where the purchaser has gone into possession under the sale. *Russell v. H. C. Akeley Lumber Co.*, *supra*.

The presumption of regularity is rebutted on proof of failure to serve notice on the occupant. *Casey v. McIntyre*, 45 Minn. 526, 43 N. W. Rep. 402.

Diligence requisite for action under this statute. *Marcotte v. Hartman*, 46 Minn. 202, 48 N. W. Rep. 767.

Evidence of knowledge of the foreclosure is sufficient to put the mortgagor on inquiry. *Id.*

The failure to state in the notice the amount due on each lot, in the foreclosure of a mortgage which is in effect a separate mortgage on each of several lots, is a "defect in the notice" covered by this statute. *Bitzer v. Campbell*, 47 Minn. 221, 49 N. W. Rep. 691.

The failure to record an assignment before giving notice is not a "defect in the notice" covered by this statute. *Burke v. Backus*, 51 Minn. 174, 53 N. W. Rep. 458.

See *Moulton v. Leighton*, 33 Fed. Rep. 143, 145.

§ 6055. Foreclosures not to be called in question after 20 years.

That no foreclosure heretofore or hereafter made by the mortgagee, his legal representatives, or assigns, of any mortgage on real property within the limits of this state, shall be adjudged invalid or be set aside, unless the action in which the validity of such foreclosure is called in question be commenced or the defence alleging its invalidity be interposed within twenty years from date of the foreclosure sale: *Provided*, That persons who, at the time of such foreclosure sale, were under disability to sue by reason of being minors, insane persons, idiots or in captivity, may commence such action or interpose such defence at any time within five years after removal of such disability; *Provided, further*, That such actions shall be commenced with reasonable diligence in all cases; *Provided*, That this act shall not affect or prejudice the rights of any bona fide purchaser, nor apply to any action or proceeding now pending in any court of this state; and *provided further*, That nothing contained in this act shall be understood as intended to repeal chapter one hundred and twelve of the general laws of Minnesota for eighteen hundred and eighty-three, or any part thereof.

(1889, c. 31, § 1.³)

§ 6056. Same—Under power of sale.

That the sheriff's certificate of any sale made and recorded in the office of the register of deeds of the proper county, more than twenty years prior to the passage of this act, under a power to sell contained in any mortgage covering

³An act limiting the time within which mortgage foreclosure sales may be called in question. Approved March 19, 1889.

and describing the same lands, shall be sufficient evidence that all the requirements of law in that behalf have been duly complied with and shall be sufficient evidence of title in fee thereunder in the purchaser at such sale, his heirs or assigns, after the time for redemption therefrom has expired, and no such sale shall be held invalid or set aside by reason of any defect or irregularity of any kind in said foreclosure proceeding unless the action in which the validity of such sale shall be called in question be commenced, or the defense calling such foreclosure in question be made within twenty years from the date of such sale. Provided, That nothing herein contained shall be construed as a repeal of chapter one hundred and twelve, general laws of eighteen hundred and eighty-three, or any part thereof. Provided, That nothing herein contained shall affect any action now pending, nor apply to any alleged foreclosure proceedings, or certificate mentioned or brought in question in such action, or the rights of any bona fide purchaser.

(1889, c. 33, § 14)

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§ 6057. Action, by what rules governed.

Actions for the foreclosure of mortgages, shall be governed by the same rules and provisions of statute as civil actions, except as herein otherwise expressly prescribed.

(G. S. 1866, c. 81, § 24; G. S. 1878, c. 81, § 27.)

See *Slingerland v. Sherer*, 46 Minn. 422, 49 N. W. Rep. 237.

§ 6058. Service of summons by publication*—Rights of defendant.

Service by publication of the summons, in the manner provided in section five, of title one of this chapter, for publication of the notice of sale therein specified, may be made upon all parties to the action against whom no personal judgment is sought; and in such case judgment may be taken without giving security as to those parties, at the expiration of twenty days after the completion of the period of publication; but such parties or any of them shall be permitted to appear and defend, upon good cause shown, at any time before final decree.

(G. S. 1866, c. 81, § 25, as amended 1868, c. 74, § 1; 1878, c. 6, § 1; G. S. 1878, c. 81, § 28.)

* See following note.

This section, assuming to provide for service by publication on defendants who are within the state, is unconstitutional and void. *Bardwell v. Collins*, 44 Minn. 97, 46 N. W. Rep. 315.

It is void both as to resident and nonresident defendants. *Smith v. Hurd*, 50 Minn. 503, 52 N. W. Rep. 922.

§ 6059. Judgment—Its contents.

Judgment shall be entered, under the direction of the court, adjudging the amount due, with costs and disbursements, and the sale of the mortgaged premises, or some part thereof, to satisfy said amount, and directing the sheriff to proceed and sell the same, according to the provisions of law relating to sales of real estate on execution, and make report to the court.

(G. S. 1866, c. 81, § 26; G. S. 1878, c. 81, § 29.)

The confirmation of a report of sale has the effect of a judgment, and cannot be attacked collaterally. *Hotchkiss v. Cutting*, 14 Minn. 537, (Gil. 408.)
See *Dodge v. Allis*, cited in note to § 6066; *Dobberstein v. Murphy*, 44 Minn. 526, 529, 47 N. W. Rep. 171; *Slingerland v. Sherer*, 46 Minn. 422, 49 N. W. Rep. 237; *Thompson v. Dale*, cited in note to § 6063.

*An act entitled an act prescribing the force and effect of sheriff's certificates of sale made under powers in mortgages and limiting the time within which such sales may be called in question. Approved April 24, 1889.

§ 6060. Transcript of judgment to be furnished sheriff.

A transcript of such judgment shall be made, and signed by the judge, or certified by the clerk, and delivered to the sheriff, and shall be his authority for making the sale.

(G. S. 1866, c. 81, § 27; G. S. 1878, c. 81, § 30.)

After confirmation it will be presumed that a transcript was delivered. *Clossen v. Whitney*, 39 Minn. 50, 38 N. W. Rep. 759.

§ 6061. Purchase by mortgagee, etc.

The mortgagee, or any one claiming under him, may fairly and in good faith bid off the premises at said sale; and in such case the statement of such fact in the report of sale shall have the same effect as a receipt for money paid upon a sale for cash.

(G. S. 1866, c. 81, § 28; G. S. 1878, c. 81, § 31.)

A mortgagee may become the purchaser at a sale under the power, if made by the sheriff. *Ramsey v. Merriam*, 6 Minn. 168, (Gil. 104.)

A mortgagee, foreclosing under the power, can become the purchaser only where the sale is made by the sheriff or other officer named in the statute. *Allen v. Chatfield*, 8 Minn. 435, (Gil. 356.)

§ 6062. Report of sale—Confirmation—Resale.

Upon the coming in of the report of sale, the court shall grant an order confirming the same, or, if it appears upon due examination that justice has not been done, may order a resale on such terms as are just.

(G. S. 1866, c. 81, § 29; G. S. 1878, c. 81, § 32.)

The district court has no authority to order a resale of the premises until the coming in of the report of sale, and the objection that it has ordered a resale before the coming in of such report may be urged in the appellate court in the first instance. *Gilman v. Holyoke*, 14 Minn. 138, (Gil. 104.)

A mortgage sale cannot be set aside until after the coming in of the report of sale. *Rogers v. Holyoke*, 14 Minn. 220, (Gil. 158.)

§ 6063. Entry of satisfaction of judgment—Execution for deficiency.

Upon confirmation of the report of sale, the clerk shall enter satisfaction of the judgment, to the extent of the sum bid for the premises, less expenses and costs; and for any balance of said judgment, execution may issue as in other cases; but no such execution shall issue on such judgment until after a sale of the mortgaged premises, and the application of the amount realized as aforesaid.

(G. S. 1866, c. 81, § 30; G. S. 1878, c. 81, § 33.)

An action by trustees of a railway mortgage, given to secure an issue of negotiable bonds, for its foreclosure, is a proceeding *in rem*, and they are not entitled, in such proceedings, to a judgment enforceable by execution for deficiency after exhausting securities. This section has no application to such case. *Welsh v. First Div. St. P. & P. R. Co.*, 25 Minn. 314.

The statute does not authorize, in addition to a decree of foreclosure, the docketing of personal judgment against the mortgagor, so as to become a lien on his other real estate, before sale of the mortgaged premises and the application of the proceeds upon the debt. *Thompson v. Dale* (Minn.) 59 N. W. Rep. 1086.

See *Slingerland v. Sherer*, 46 Minn. 422, 49 N. W. Rep. 237.

§ 6064. Redemption by mortgagor, etc.—By creditor.

The mortgagor, or those claiming under him, shall have one year after the date of the order of confirmation, in which to redeem the premises sold, or any separate portion thereof, by paying the amount bid therefor, with interest thereon from the day of sale; and judgment or other lien creditors may redeem in the order and manner specified in title one of this chapter: *provided*, that no creditor shall be entitled to redeem, unless, within the year allowed for redemption, he files notice of his intention to redeem, in the office of the district clerk where the judgment is entered.

(G. S. 1866, c. 81, § 31; G. S. 1878, c. 81, § 34; as amended 1883, c. 25, § 1.)

Under § 1, c. 87, Laws 1860, a mortgagor, his heirs or assigns, could redeem, from a sale on foreclosure, not only within three years from the day of sale, but within three

years from the time of filing notice of such sale in the office of the register of deeds. *Thompson v. Foster*, 21 Minn. 319. § 1, c. 87, Laws 1860, construed, and held, that the time within which a redemption might be made under such section from foreclosure sale, commenced to run from the filing of the notice of such sale in the office of the register of deeds. *Id.*

In a case of redemption under § 1, c. 87, Laws 1860, made within three years from the time of filing notice of the sale on foreclosure, the sheriff was, both under § 5, c. 19, Laws 1862, and § 32, c. 81, G. S., (§ 6063,) the proper person to whom to tender the redemption money. *Id.*

See *Bovey De Laittre Lumber Co. v. Tucker*, 48 Minn. 223, 50 N. W. Rep. 1033.

§ 6065. Application of former sections.

The provisions of sections three, four, nine, eleven, fourteen, fifteen and seventeen, aforesaid, shall apply to and govern proceedings under this title.

(G. S. 1866, c. 81, § 32, as amended 1876, c. 39, § 2; G. S. 1878, c. 81, § 35.)

The foregoing section has reference to sections of title 1 of this chapter as originally enacted in G. S. 1866; the sections mentioned being identical in terms with the corresponding sections of the act of 1878, printed in G. S. 1878 as title 1 of this chapter.

See *Bovey De Laittre Lumber Co. v. Tucker*, 48 Minn. 223, 50 N. W. Rep. 1033.

§ 6066. Final decree granted, when—Form and effect thereof.

At the expiration of the time allowed for redemption, and no one redeeming, the court, upon the application of the purchaser or his assigns, shall grant a final decree, which shall recite the judgment aforesaid, the fact of sale, the premises sold, and the amount bid therefor, and that no redemption has been made, and shall adjudge and decree that the title to said premises is in said purchaser or his assigns, free and clear of all equity of redemption on the part of any one who is a party to the judgment. Such decree, being recorded in the office of the register of deeds of the county in which the premises lie, shall be effectual to pass the title to the same as against the parties aforesaid.

(G. S. 1866, c. 81, § 33; G. S. 1878, c. 81, § 36.)

An appeal may be taken, as from a judgment, from the "final decree," in an action to foreclose a mortgage entered pursuant to § 6066. Upon such appeal no alleged error in the judgment directing a sale under § 6059, can be reviewed. To obtain a review of that judgment, an appeal must be taken from it. *Dodge v. Allis*, 27 Minn. 376, 7 N. W. Rep. 732.

Irregularities in making sale are not available upon an application after final decree, to set aside the sale, decree of confirmation, and final decree, unless sufficient excuse is shown for failure to present them in opposition to an application to confirm the sale. *Coles v. Yorks*, 36 Minn. 338, 31 N. W. Rep. 353.

One who succeeds to the purchaser's rights by redemption is entitled to a final decree. *Bovey De Laittre Lumber Co. v. Tucker*, 48 Minn. 223, 50 N. W. Rep. 1033.

See *Dobberstein v. Murphy*, 44 Minn. 520, 529, 47 N. W. Rep. 171; *State v. Kerr*, 51 Minn. 417, 53 N. W. Rep. 719.

§ 6067. Surplus on sale, how disposed of.

Whenever there is a sale for cash, under the provisions of this title, and, after satisfying the mortgage debt, with costs and expenses, there is a surplus, it shall be brought into court for the benefit of the mortgagor, or the person entitled thereto, subject to the order of the court.

(G. S. 1866, c. 81, § 34; G. S. 1878, c. 81, § 37.)

§ 6068. Surplus to be invested, when.

If such surplus, or any part thereof, remains in the said court for the term of three months, without being applied for, the district judge may direct the same to be put out at interest, subject to the order of the court, for the benefit of the defendant, his representatives or assigns, to be paid to them by the order of the court.

(G. S. 1866, c. 81, § 35; G. S. 1878, c. 81, § 38.)

§ 6069. Foreclosure for instalment—Dismissal.

Whenever an action is brought for the foreclosure of any mortgage upon which there is due any interest, or any portion or instalment of the principal, and there are other portions or instalments to become due subsequently, the action

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shall be dismissed, upon the defendant's bringing into court, at any time before the judgment of sale, the principal and interest due, with costs.

(G. S. 1866, c. 81, § 36; G. S. 1878, c. 81, § 39.)

§ 6070. Same—Proceedings stayed, when.

If, after a judgment of sale is entered against a defendant in such case, he brings into court the principal and interest due, with costs, the proceedings in the action shall be stayed; but the court shall enter a judgment of foreclosure and sale, to be enforced, by a further order of the court, upon a subsequent default in the payment of any portion or instalment of the principal, or of any interest thereafter to grow due.

(G. S. 1866, c. 81, § 37; G. S. 1878, c. 81, § 40.)

§ 6071. Court may order sale of whole of mortgaged premises, when.

Nothing herein contained shall be so construed as to prevent the court from adjudging that the whole of the mortgaged premises shall be sold, notwithstanding they consist of distinct farms or tracts, whenever it is made to appear that a sale of the whole will be most beneficial to the interests of the parties.

(G. S. 1866, c. 81, § 38; G. S. 1878, c. 81, § 41.)

§ 6072. Court may compel delivery of possession.

Whenever possession of lands foreclosed as aforesaid is wrongfully withheld after final decree, the court may compel delivery of possession to the party entitled thereto, by order directing the sheriff to effect such delivery.

(G. S. 1866, c. 81, § 39; G. S. 1878, c. 81, § 42.)

§ 6073. Strict foreclosure—Final decree.

Nothing contained in this chapter shall be so construed as to prevent judgment being given for the strict foreclosure of a mortgage, in cases when such remedy is just or appropriate; but in case of strict foreclosure, no final decree of foreclosure shall be rendered until the lapse of one year after the judgment adjudging the amount due on such mortgage.

(1870, c. 58, § 2; G. S. 1878, c. 81, § 43.)

In an action instituted before the general statute (of 1866) the court may decree a strict foreclosure of a mortgage. *Bacon v. Campbell*, 13 Minn. 194, (Gil. 183.)

A judgment for plaintiff, in an action to redeem, has the effect of a strict foreclosure of the mortgage if the plaintiff fail to redeem as allowed by the judgment. In such a judgment the plaintiff must be allowed at least one year in which to redeem. *Hollingsworth v. Campbell*, 28 Minn. 18, 8 N. W. Rep. 873.

See, also, *Wilder v. Haughey*, 21 Minn. 101; *Thompson v. Dale* (Minn.) 59 N. W. Rep. 1036.

§ 6074. Attorney's fees on foreclosure⁵—Schedule.

That in all cases and whenever any mortgage hereinafter executed, covering any lands in this state, shall contain any covenant on the part of the mortgagor to pay any sum as an attorney's or solicitor's fee in case of the foreclosure of such mortgage, or when any such mortgage shall contain any stipulation or provision, authorizing or empowering the mortgagee, in case of any sale of the mortgaged premises, either upon foreclosure by action or by advertisement, to retain any sum whatever as an attorney's or solicitor's fee, the amount of such fee contained in such mortgage shall not exceed the following sums, to wit: when the amount of the debt secured by such mortgage shall not exceed the sum of five hundred dollars, the amount of such attorney's or solicitor's fee shall not exceed the sum of twenty-five dollars; when the amount of such debt shall exceed the sum of five hundred dollars, and shall not exceed the sum of one thousand dollars, the amount of such fee shall not exceed the sum of fifty dollars; when the amount of such debt shall exceed the sum of one thousand dollars, and shall not exceed the sum of five thousand dollars, the amount of such fee shall not exceed the sum of seventy-five dollars; when the

⁵ An act fixing the amount of attorney's or solicitor's fee to be contained in mortgages upon real estate situate within this state. Approved March 7, 1873 (Laws 1873, c. 49).

amount of such debt shall exceed the sum of five thousand dollars, and shall not exceed the sum of ten thousand dollars, the amount of such fee shall not exceed the sum of one hundred dollars; when the amount of such debt shall exceed the sum of ten thousand dollars, the amount of such fee shall not exceed the sum of two hundred dollars; and in all cases where any such mortgage shall contain any covenant to pay, or shall in any manner authorize or permit the retaining or application of, any greater sum as an attorney's or solicitor's fee, in case of the foreclosure of such mortgage, than as is herein provided, such covenant or authority shall be void for the excess of such fee above the fee herein provided; and no such excess whatever shall be collected, retained or applied, by virtue of anything in such mortgage contained.

(1873, c. 49, § 1; G. S. 1878, c. 81, § 44.)

This section does not apply to the foreclosure of a railroad mortgage. *Seibert v. Minneapolis & St. L. Ry. Co.* (Minn.) 59 N. W. Rep. 826.

§ 6075. Same—To be charged only when attorney is employed.

That in all cases where any mortgagee, or his heirs, executors, administrators or assigns, shall foreclose any mortgage without the employment of an attorney of the courts of record of this state to conduct such foreclosure, such mortgagee or other person shall not be entitled to collect, demand, receive, or retain any sum whatever as an attorney's or solicitor's fee; and in all such cases, where any sum whatever as or for such fee is included in or made a part of the amount of the bid upon which the mortgaged premises are sold, the amount of such fee so included in such bid shall be paid in money by the purchaser to the sheriff or other officer making such sale, before the certificate of such sale shall be executed, and shall be by such sheriff or other officer paid to the mortgagor, or those having his estate in the mortgaged premises.

(1873, c. 49, § 2; G. S. 1878, c. 81, § 45.)

§ 6076. Same—Lawful fees may be collected on foreclosure.

That where any such mortgage shall contain any covenant to pay, or any stipulation or provision authorizing or empowering the mortgagee, in case of any foreclosure sale of the mortgaged premises, to retain, any sum such as is in this act provided as an attorney's or solicitor's fee, such mortgagee, or his heirs, executors, administrators or assigns, shall be entitled to collect or retain such fee upon the foreclosure of such mortgage, either by action or advertisement.

(1873, c. 49, § 3; G. S. 1878, c. 81, § 46.)

What fees and costs must be paid to stop a foreclosure by advertisement after the notice has been drawn by an attorney, and set up by the printer. *Mjones v. Yellow Medicine Co. Bank*, 45 Minn. 335, 47 N. W. Rep. 1073.

As to attorney's fees. *Coles v. Yorks*, 28 Minn. 464, 10 N. W. Rep. 775; *Seibert v. Minneapolis & St. L. Ry. Co.*, cited in note to § 6074.

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