

GENERAL STATUTES

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CHAPTER 83

FORECLOSURE OF MORTGAGES

BY ADVERTISEMENT

8107. Limitation—Every mortgage of real estate heretofore or hereafter executed, containing a power of sale, upon default being made in any condition thereof, 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. Said fifteen years shall not be extended by reason of any non-residence, or of any payment made or applied upon such debt after its maturity. (4457)

See §§ 7698, 7699.

1. Foreclosure in general—The term foreclosure is sometimes used to denote the sale and attendant proceedings (28-6, 8+829; 32-460, 21+714; 63-517, 65+941); sometimes the entire process of barring the equity of redemption, including the expiration of the redemption period (27-175, 6+489). Foreclosure proceedings, in whatever manner conducted, have for their object the enforcement of the security; the application of the property to the satisfaction of the debt or obligation secured (29-226, 13+34). The right to foreclose is not affected by possession (23-328).

See 97-31, 106+98.

2. Two methods—There are only two methods by which a mortgage may be foreclosed, namely, by action and by advertisement (21-520). The common law method by entry and possession does not obtain in this state (See 29-226, 13+34). The two remedies are cumulative (39-378, 40+255). There is this difference between a foreclosure by advertisement and a foreclosure by action. In the former the title passes by virtue of the mortgage and the mortgage must be sufficient to operate as a conveyance as soon as the equity of redemption is barred by the sale; but in the latter the title passes by virtue of the decree and sale under it. There is no going behind the decree to ascertain if the mortgage was sufficient to operate as a conveyance (39-378, 40+255). If the mortgage contains no power it can only be foreclosed by action (20-264, 237). A release by the mortgagor to the mortgagee of the equity of redemption after condition broken, is tantamount to foreclosure (29-226, 13+34).

3. General nature of foreclosure by advertisement—A foreclosure by advertisement is an ex parte proceeding (7-315, 243) in pais and in rem (18-232, 212; 24-315, 31 Am. Rep. 346; 31-495, 18+450; 46-164, 47+970, 48+783; 53-346, 55+557; 72-49, 74+1018, 42 L. R. A. 103; 74-72, 76+958). While the power to foreclose is derived from the convention of the parties, yet the proceedings in the exercise of the power, so far as regulated by statute, are purely statutory (74-72, 76+958; 82-375, 85+172). For the purpose of accomplishing a foreclosure, a proceeding by advertisement takes the place of an action; and the service of notice by publication and upon the party in possession takes the place of service of process by which an action to foreclose is commenced (26-347, 4+231). The advantages of foreclosure by advertisement over foreclosure by action are that it avoids the necessity of bringing in as parties all persons in interest; that it avoids the danger of a failure to secure a perfect title by reason of a defect of parties defendant (72-49, 74+1018, 42 L. R. A. 103); that it is simple and inexpensive (62-195, 64+381); and that it is expeditious (18-232, 212). The proceeding is analogous to a judicial proceeding (45-285, 47+803). It is controlled by the statute irrespective of the terms of the mortgage (19-85, 58; 45-285, 47+803). It is in derogation of common law (62-195, 64+381). It is not a special proceeding within the meaning of G. S. 1878 c. 88 § 9 (53-346, 55+557).

4. The power—Powers of sale in mortgages are not the creatures of the statute, but of the convention of the parties. Statutes merely regulate the manner of their execution. A party may grant a valid power of this kind in the absence of any statute either authorizing its creation or regulating its exercise (45-285, 47+803). But the statute is superior to the power. 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 (19-85, 58). And the statute may have requirements in addition to those in the mortgage (45-285, 47+803). The power of sale is a part of the mortgage and passes by an assignment of the latter without special mention (22-349; 54-1, 55+864). The transfer of a portion of the mortgage debt will not carry with it a corresponding portion of the power (33-224, 22+381). The authority conferred upon a mortgagee to foreclose a mortgage by advertisement is that found in the power of sale as that power appears in the instrument itself (48-260, 51+284). The power of sale cannot be severed from the legal ownership of the mortgage (54-1, 55+864; 73-240, 75+1047). Payment of the mortgage extinguishes the power (11-166, 105). If there is no power the only way that the mortgage can be foreclosed is by action (20-264, 237). The power is not exhausted by an abortive sale (31-125, 16+849; 40-479, 42+396).

5. Death, insanity or disability of the mortgagor—The right to foreclose is not affected by the death (15-512, 423; 85-152, 88+433), insanity or disability (68-323, 71+395, 72+71; 72-49, 74+1018, 42 L. R. A. 103) of the mortgagor.

6. Strict compliance with statute necessary—While the power to foreclose is derived from the convention of the parties the proceedings in the exercise of that power, so far

as regulated by statute, are wholly statutory, and in order to constitute a valid foreclosure every statutory requirement must be strictly, or at least substantially, complied with (4-433, 335; 4-542, 426; 7-315, 243; 30-23, 13+924; 30-537, 16+449; 41-9, 42+482; 45-203, 47+788; 48-260, 51+284; 62-195, 64+381; 69-223, 72+106; 74-72, 76+958; 82-288, 84+1024; 82-375, 85+172). It is not necessary for the party seeking relief to show actual prejudice (7-315, 243; 82-288, 84+1024), but he cannot have relief for non-compliance with a requirement not designed for his protection (30-23, 13+924. See 31-125, 16+849; 74-72, 76+958). Mere irregularities are not fatal unless they operate to prejudice some party interested (31-125, 16+849).

7. Compliance with statute sufficient—If a foreclosure complies with the requirements of the statute it is sufficient although there may be additional requirements contained in the mortgage (19-85, 58).

8. What law governs—Impairment of contract—The remedial rights of the parties relating to the mode of exercising the power, except in so far as such mode may be essential to the beneficial character of the mortgage, are governed by the law in force at the time of the foreclosure. Their substantive rights, arising from an exercise of the power, are governed by the law in force at the time of the execution of the mortgage (41-325, 43+385; 45-285, 47+803). Thus the statute of limitations (21-520; 32-460, 21+714); the statute regulating the recording of the certificate of sale (44-353, 46+559); the statute regulating the publication of the notice of sale (16-45, 30); the statute defining who shall conduct the sale (45-285, 47+803); and the statute defining the force of the certificate as evidence (41-250, 42+1016), in force at the time of the foreclosure, govern. On the other hand, the right to foreclose (36-136, 30+458); the right to redeem (27-18, 6+373; 36-136, 30+458; 41-388, 43+78); the time within which to redeem (8-387, 344; 10-174, 141; 28-496, 11+84); the amount required to redeem (28-496, 11+84); and the rights of the parties in the property arising from the sale (4-483, 375; 28-496, 11+84. The last case overrules in part 4-298, 215; 4-483, 375; 5-277, 219; 7-368, 290, 82 Am. Dec. 101; 12-335, 221, 93 Am. Dec. 234; 13-501, 462, 97 Am. Dec. 243), are governed by the law in force at the time of the execution of the mortgage.

9. Statute of limitations—It is not enough to commence the proceedings within the time limited; they must be completed (32-460, 21+714). Entering into possession after a mortgage has become barred does not revive it (24-221; 45-431, 48+8). Under 1871 c. 52 the limitation was ten years (21-520; 24-221; 26-365, 4+611; 32-460, 21+714; 40-479, 42+396; 45-431, 48+8). Prior to 1903 c. 15 it was an open question whether a partial payment on the debt would extend the time in which to redeem (81-454, 84+323). 1870 c. 60 limiting the time to commence an action to foreclose held not applicable to a foreclosure by advertisement (20-453, 407). For present statute, see § 7698.

10. Effect of foreclosure on debt—A foreclosure sale has the effect of extinguishing the mortgage debt to the amount for which the property is sold whether the sale is to the mortgagee or to a stranger (12-335, 221, 93 Am. Dec. 234; 21-132; 23-13; 29-226, 13+34; 33-354, 23+535; 50-315, 52+897; 52-23, 53+867; 59-493, 61+554; 67-160, 69+715, 1069).

11. Effect of foreclosure on lien—Where a mortgage is given on a single tract to secure a debt due and payable as an entirety, and on default in payment a foreclosure is had under a power, a sale for less than the amount due exhausts the lien of the mortgage (69-469, 72+707, 65 Am. St. Rep. 576). It is the general rule that a single valid sale exhausts the lien of the mortgage, or, in other words, that there can be but one valid sale of the same land under the same power (10-379, 304; 26-309, 4+39; 35-189, 28+221; 69-469, 72+707, 65 Am. St. Rep. 576). The remedy on the mortgage as a security is exhausted by the foreclosure. The mortgage becomes as a security, *functus officio*, and its only future office is as a muniment of title in case the mortgagor fails to redeem. After the foreclosure the rights of the parties are to be measured, not by anything in the mortgage—except as a muniment of title—but by the statute (50-315, 52+897). A sale of the whole of mortgaged premises for an instalment of the mortgage debt exhausts the lien of the mortgage. There can be another sale to satisfy a subsequent instalment only where there remains land not sold at the first sale (26-338, 3+986, 6+486; 27-175, 6+489; 29-53, 11+143; 69-469, 72+707, 65 Am. St. Rep. 576; 74-345, 77+214). Under G. S. 1866 c. 81 § 3 the rule was otherwise (20-106, 92; 26-547, 6+350). But if the owner or his assign annuls the sale for a first instalment by redeeming, a second sale may be had for another instalment (4-172, 117; 27-175, 6+489; 30-395, 15+676). The foregoing rules are inapplicable to an invalid or incomplete sale (27-175, 6+489; 73-90, 75+1034. See 69-5, 71+694).

12. Mortgage specific lien on separate tracts—Where a mortgage is made a specific lien on separate tracts it is optional with the mortgagee to foreclose on each separate lien or to include all the liens in one foreclosure (87-179, 91+469).

8108. Requisites for foreclosure—To entitle any party to make such foreclosure, it is requisite:

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

2. 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.

3. That the mortgage has been recorded, and, if it has been assigned, that

all assignments thereof have been recorded: Provided that, if the mortgage is upon registered land, it shall be sufficient if the mortgage and all assignments thereof have been duly registered. (4458)

Historical—G. S. 1894 § 6029 subd. 3 was amended by 1905 c. 136 to read as follows: "Third. That the mortgage containing such power of sale had been duly recorded, and if assigned, that all assignments thereof have been recorded; provided, that, if the mortgage is upon registered land, it shall be sufficient if the mortgage, and all assignments thereof, have been duly registered." See R. L. § 5504 [9398].

1. Default—There is no right to foreclose under a power until it has become operative by reason of some default (22-157. As to what constitutes default, 21-142; 25-15; 35-499, 29+194; 45-59, 47+316; 45-335, 47+1072; 51-485, 53+767; 84-34, 86+757). Where a mortgage provides that on default in the payment of the interest the mortgagee may declare the whole sum due, the election may be exercised by advertising a sale without other notice of the election (26-347, 4+231).

2. No action or proceeding—11-438, 323, 88 Am. Dec. 95; 18-66, 51; 22-157.

3. Only record owner may foreclose—Only the legal and record owner of the mortgage and power can give the notice and foreclose by advertisement (12-113, 62; 22-349, 25-15; 26-309, 4+39; 31-125, 16+849; 33-224, 22+381; 41-112, 42+787; 41-388, 43+78; 44-521, 47+150; 48-260, 51+284; 51-174, 53+458; 54-1, 55+864; 73-15, 75+743; 73-240, 75+1047; 81-438, 84+327; 83-37, 85+919, 85 Am. St. Rep. 444; 90-24, 95+451; 95-392, 104+237, 111 Am. St. Rep. 476). The statute authorizing this method of foreclosure designs that there shall be of record a legal mortgage and that the record shall be so complete as to show to all interested parties the right of the mortgagee or his assigns to invoke its aid (18-232, 212; 20-464, 419; 21-336; 41-112, 42+787; 48-260, 51+284). The debt and consequently the real ownership of the mortgage may be in one person, while what may be termed the "legal title" of the mortgage is in another. In such a case the power of sale must be exercised in the name of the party who has the legal title to the instrument (22-349; 31-125, 16+849; 33-224, 22+381; 51-174, 53+458; 83-37, 85+919, 85 Am. St. Rep. 444). The power of sale cannot be severed from the legal ownership of the mortgage. It is indivisible and no matter how many owners of the mortgage there may be, there is but one power. If there are two or more legal owners, whether as original mortgagees or as assignees, or both, the power is in them jointly and all must join in the foreclosure proceedings (54-1, 55+864). If the record owner loses his interest in the mortgage during the course of the publication of the notice he cannot complete the foreclosure (54-1, 55+864; 73-240, 75+1047). Whether, the publication being regular, a change in the record ownership of the mortgage between the last publication and the day of sale will affect the regularity of the sale, is an open question (54-1, 55+864. See 4-25, 11). Where an assignee of a mortgage failed to record his assignment a foreclosure by the mortgagee was upheld as against innocent purchasers (95-392, 104+237, 111 Am. St. Rep. 476).

4. Stranger to mortgagee—Only the mortgagee, his agent, attorney, executor, administrator or assignee, can exercise the power of sale (90-24, 95+451). The attempt of a stranger to the mortgagee to foreclose is a nullity (38-197, 36+333, 8 Am. St. Rep. 661).

5. Executor or administrator—A domestic executor or administrator may foreclose a mortgage without recording his appointment (4-25, 11; 38-38, 35+714). It is provided by statute that a foreign executor or administrator may foreclose a mortgage in this state (§ 7463). This statute is a regulation and not a grant of power (38-38, 35+714; 78-249, 80+1056). An assignee of a foreign executor may foreclose without recording the appointment of his assignor (78-249, 80+1056). An administrator held authorized to foreclose a mortgage which he himself held against the mortgagor of whose estate he was administrator (85-152, 88+433).

6. Equitable owner—Foreclosure proceedings by advertisement are based wholly upon record ownership and mere equitable interests cannot be recognized or given effect therein (41-112, 42+787; 48-260, 51+284; 51-174, 53+458; 54-1, 55+864; 81-438, 84+327). There is no such thing as a foreclosure by advertisement of an equitable mortgage (41-112, 42+787). The fact that others have equitable interests in a mortgage does not affect the right of the legal owner thereof to foreclose by advertisement, but a court of equity will control the exercise of the right and the disposition of the proceeds of sale so as to protect equitable interests (22-349; 26-309, 4+39; 31-125, 16+849; 33-224, 22+381; 51-174, 178, 53+458; 81-438, 84+327; 83-37, 85+919, 85 Am. St. Rep. 444. See 30-4, 13+907; 44-521, 47+150; 69-219, 72+68). While an equitable owner cannot foreclose in his own name he may foreclose in the name of the record owner, and if the record owner allows such use of his name he is bound by the foreclosure (45-412, 48+13. See 44-521, 47+150). Where the record owner holds a mortgage in trust for others they may compel him, through a court of equity, to foreclose and account for the proceeds (31-125, 16+849; 45-412, 48+13).

7. Assignee of mortgage—The power of sale cannot be severed from the legal ownership of the mortgage and passes to the assignee of the mortgage without special mention (22-349; 54-1, 55+864). An assignee, however, cannot exercise the power unless all assignments are recorded (12-113, 62; 18-232, 212; 41-388, 43+78; 51-174, 53+458; 54-1, 55+864; 73-15, 75+743; 73-240, 75+1047; 101-16, 111+654). But assignments by operation of law need not be recorded. Thus an executor or administrator may foreclose a mortgage without recording his appointment (4-25, 11; 38-38, 35+714). As to what constitutes an assignment by operation of law (51-174, 53+458). Where an assignment is made by an agent his authority need not be recorded (18-232, 212). If the assignment of a mortgage by the mortgagee has been executed and recorded, the only way in which he can recover authority to exercise the power of sale in his own name is to procure a written re-assignment of the mortgage and place it on record (51-174, 53+458). Where a mortgagee bid in the property at a void sale under the

power and then conveyed the property to A, who conveyed portions of it to others, and afterwards the mortgagee assigned the mortgage to A, it was held that these conveyances furnished no reason for the mortgagor objecting to A foreclosing under the power (31-125, 16+849). Instrument purporting to be assignment, in which no assignee is named, but blank space left for his name, is, until blank legally filled, a nullity. If name of assignee is afterwards inserted by authority of mortgagee, express or implied, and then recorded, it is a valid assignment (101-16, 111+654).

8. Sufficiency of the record—If an assignment has not been properly acknowledged so as to entitle it to record a foreclosure by the assignee is void (41-388, 43+78). A mortgage with only one witness will not authorize a foreclosure though recorded (30-197, 14+889). 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. Otherwise when the registration has been legalized (11-438, 323, 88 Am. Dec. 95). A mortgage on lands in two counties but recorded in only one may be foreclosed as to the lands in the county where it is recorded (16-116, 106; 32-205, 20+142). A false and impossible particular added to the description of the premises by mistake of the register will not prevent a valid foreclosure (20-464, 419). But a false and misleading description is fatal (21-336). Where an assignment was indorsed on a mortgage, describing it as, "the within described mortgage," and was afterwards recorded on a subsequent page of the same book as the mortgage, it was held a sufficient record to authorize a foreclosure (15-171, 131. See 45-376, 48+3). A mortgage covered land situated in part in the county of M and in part in the county of R. The mortgage was duly recorded in full in R, but in recording it in M the description of the land situated in R was omitted from the record. Held, that while the record in M was good as to the land therein situated, yet it was not sufficient to draw to it the right to proceed under the power to advertise and sell in M the land situated in R. In order to foreclose in one county premises situated in two counties the mortgage must be recorded in both (32-205, 20+142). All assignments must be recorded (73-15, 75+743).

8109. Failure to record assignment—Curative—Every foreclosure of mortgage by advertisement heretofore made where foreclosed by an assignee and where the assignment had not been recorded prior to the commencement of the foreclosure proceedings, but recorded thereafter, such foreclosure, if otherwise regular, shall be and hereby is declared to be valid and effectual for all purposes as if such assignment had been duly and properly recorded in the office of the register of deeds of the proper county prior to the commencement of such foreclosure proceedings. ('09 c. 274 § 1)

Section 2 provides that the act shall not affect pending actions, etc.

8110. Defective assignments—Curative—In all cases where an assignment of real estate mortgage has been defectively executed by reason of the failure of witnesses to the signature of one or more of the persons executing the same, or the failure of one or more persons executing the assignment to acknowledge the execution thereof, or both of said defects, and the thus defective assignment has been recorded in the office of the register of deeds of the county where the mortgage was recorded and where the land affected thereby is situate, all such assignments and the record thereof, and any foreclosure by the assignee of the mortgage thus assigned, when otherwise legally foreclosed, is hereby legalized and confirmed and made valid; and all such records may nevertheless be read in evidence in any court within this state and shall be received as prima facie evidence of the contents of the original instruments of which they purport to be records; and all such records shall in all respects have the same force and effect as they would have in such original instruments at the time they were so recorded had been legally entitled to record and were legally recorded. Provided, however, that this act shall not affect any action or proceeding now pending in any court of this state. ('07 c. 86)

8111. Notice of sale—Service on occupant—Six weeks' published notice shall be given that such mortgage will be foreclosed by sale of the mortgaged premises or some part thereof, and at least four weeks before the appointed time of sale a copy of such notice shall be served in like manner as a summons in a civil action in the district court upon the person in possession of the mortgaged premises, if the same are actually occupied. If there be a building on such premises used by a church or religious corporation, for its usual meetings, service upon any officer or trustee of such corporation shall be a sufficient service upon it. (4459)

1. Publication—Where a mortgage covers several separate tracts lying in different counties it is unnecessary to publish the notice in more than one of them (58-192, 59+999). A publication may be discontinued provided no one is misled (4-433, 335; 7-46, 31). The day set for sale in the notice may be a considerable time beyond the last day of publication (16-

45, 30; 18-66, 51), or it may be on that day (6-192, 123). In computing the time of publication the statutory rule of excluding the first day and including the last applies (6-192, 123). It is no objection that the notice is published for more than six successive weeks (16-45, 30). Publication must not begin before a default. A newspaper is published when it issues from the hands of the publisher. A publication in only one sixth of the whole number of copies of an edition is insufficient. A notice not published for the prescribed time is not cured by a postponement of the sale (21-142). A religious newspaper publishing general as well as religious news is a newspaper within G. S. 1378 c. 81 § 5 (33-349, 37+792). A failure to publish in a newspaper in the proper county renders the sale void (4-32, 15). An affidavit of publication may properly be made by the publisher (20-448, 402; 46-535, 49+257).

2. Service on occupant—Service of notice upon the occupant is required not solely for his benefit but as a means of communicating notice through him to all who may be interested in the land. Consequently any person deriving title or interest through the mortgagor may attack a sale for want of such service and the occupant cannot waive the service so as to affect interested parties (45-526, 48+402; 74-72, 76+958). To require notice to be served upon a party his occupancy must be open and visible, but it is not necessary that he should be living on the land (82-375, 85+172. See 87-7, 91+25; 52 Fed. 616). Service may be made by leaving a copy of the notice at the house of usual abode of the occupant with some person of suitable age and discretion then resident therein (50-348, 52+934; 53-286, 55+133, 20 L. R. A. 159; 74-33, 76+952; 79-350, 82+668) and it is not necessary that such person should be a member of the family or household of the occupant (74-33, 76+952; 79-350, 82+668). It is immaterial that the person making the substituted service thought at the time that the person to whom he delivered it was the one in actual occupancy. It is not necessary that the notice should be addressed to anyone or that the person with whom it is left should be advised as to the party for whom it is intended (50-348, 52+934). A girl fourteen years old is presumptively a person of suitable age and discretion. It is not necessary that the person should be familiar with business transactions and legal proceedings (53-286, 55+133, 20 L. R. A. 159). If the mortgagor is in the actual occupation of part of the land and a tenant of his of the rest, notice on the mortgagor alone is sufficient, at least so far as he is concerned (30-23, 13+924). Where husband and wife are residing upon land owned by him he is the proper person on whom to serve the notice (28-464, 10+775). The mortgagee himself may serve the notice (46-64, 47+970, 48+783). An occupant must be served though he is insane (72-49, 74+1013, 42 L. R. A. 103). Failure to make the required service renders the sale void (7-315, 243; 69-5, 71+694; 84-34, 86+757 and cases supra). Where premises consist of separate farms, each occupied by different person, notice must be served on each (101-16, 111+654).

3. None on mortgagor—There is no provision for service of notice on the mortgagor as such (82-375, 85+172). Formerly the rule was otherwise (15-512, 423; 16-45, 30; 82-375, 85+172). There is no provision for service on subsequent incumbrancers (6-240, 158).

8112. Requisites of notice—Each notice shall specify:

1. The name of the mortgagor and of the mortgagee, and of the assignee of the mortgage, if any;
2. The date of the mortgage, and when and where recorded, except where the mortgage is upon registered land, in which case the notice shall state that fact, and when and where registered;
3. The amount claimed to be due thereon, and taxes, if any, paid by the mortgagee at the date of the notice;
4. A description of the mortgaged premises, conforming substantially to that contained in the mortgage; and
5. The time and place of sale. (4460)

Historical—G. S. 1894 § 6033 subd. 2 was amended by 1905 c. 136 to read as follows: "Second. The date of the mortgage, and when and where recorded, except where the mortgage is upon registered land, the notice shall state that fact, and when and where the mortgage is registered."

1. By whom signed—Names of the parties—The notice must be the act of the person in whom the power to foreclose is vested and it must show that it is. The name of each assignee must be given (73-15, 75+743). Even where mortgage is assigned by mortgagee and reassigned to him (112-433, 129+578). It must appear to be given by competent authority (38-197, 36+333, 8 Am. St. Rep. 661; 48-260, 51+284; 54-1, 55+864; 73-15, 75+743). It must be signed by all the record owners of the mortgage (54-1, 55+864). It must disclose the true state of the record (48-260, 51+284). A notice which, upon its face, is declared to be the act of a designated person, and which, as such, would be void, cannot be made effectual by proof that it was really the act of another and undisclosed person, not even standing in a relation of privity with the person in whose name the notice was given. A notice by a mere stranger can effect nothing (38-197, 36+333, 8 Am. St. Rep. 661). It must be signed by the legal record owner of the mortgage (see § 8108 note 3). A notice signed by a mere equitable owner is void (see § 8108 note 6). A notice signed by an attorney of the legal owner of the mortgage is sufficient (30-537, 16+449). A notice in the name of a deceased person is void (38-197, 36+333, 8 Am. St. Rep. 661; 44-446, 46+908; 45-412, 48+13; 46-148, 48+769, 24 Am. St. Rep. 201). A notice describing a mortgage as having been executed to "Isaac Crowe, agent of Abraham Becker" and signed "Isaac Crowe, agent for Abraham Becker, Abraham Becker, mortgagee in fact" is sufficient (20-448, 402). A mortgage was executed to a partnership consisting of Farnham & Lovejoy. The notice of sale describing the mortgage as given to Farnham & Lovejoy, contained in parenthesis, the full names of such partners immediately

after the firm name and was subscribed "Farnham & Lovejoy, mortgagees." Held sufficient (43-211, 45+155, 19 Am. St. Rep. 235). A mistake in using "mortgagee" for "mortgagor" is fatal (see 62-195, 64+381). A notice signed "Silas H. Baldwin, administrator of the estate of Rachel A. Baldwin, the said mortgagee, deceased" is sufficient (4-25, 11).

2. Date of the mortgage and notice—The notice must state the date of the mortgage (62-195, 64+381). The notice itself need not be dated. If it is dated the amount claimed must correspond with such date, but when it is not dated the time of its first publication is its date (6-168, 104. See 28-464, 10+775).

3. When and where mortgage recorded—The notice must state the date upon which the mortgage was recorded (30-537, 16+449) and the page of the record where it was recorded (82-288, 84+1024). It need not refer to the recording of assignments (15-171, 131).

4. The amount claimed to be due—The object of requiring the amount claimed to be due to be stated in the notice is to inform interested parties how much is claimed against their property, so that they may act accordingly. It is not enough that the notice refers to the record from which such information might be ascertained. The notice itself must give the information (41-9, 42+482; 69-223, 72+106). It is the amount claimed to be due at the date of the notice, and not the total amount secured by the mortgage and not then due, which must be stated (62-327, 64+906; 62-442, 64+1148. See 45-238, 47+792). When the notice is dated, the amount claimed must correspond with such date; when it is not dated, the date of the first publication controls (6-168, 104). When a foreclosure is made for an instalment due it is not necessary to state that it is for an instalment (62-442, 64+1148). Where the mortgagee may elect to declare the whole amount due upon default in payment of an instalment it is not necessary to state that he so elects (26-347, 4+231; 62-442, 64+1148). If a mortgage covers several tracts and is made a specific and separate lien on each tract for a specified amount the notice must specify the amount claimed to be due on each separately (41-9, 42+482; 47-221, 49+691; 51-116, 52+1127. See 38-349, 37+792; 41-14, 42+483; 42-281, 44+69; 64-190, 66+268; 87-179, 91+469). Where the amount claimed to be due is within the literal terms of the contract the notice is sufficient although less is legally due, at least in the absence of a showing of fraud or prejudice (20-448, 420). Claiming more than is legally due or stipulated in the mortgage does not affect the validity of the sale in the absence of a showing of fraud or prejudice (4-542, 426; 6-168, 104; 6-240, 158; 19-85, 58; 20-448, 420; 29-307, 13+136; 45-238, 47+792; 55-379, 57+132). If the mortgage is given to secure several notes which pass into different hands the party owning the mortgage and foreclosing should claim the amount due on all the notes (26-309, 4+39. See 69-219, 72+68). Substantial overstatement of amount ground for temporarily enjoining sale (114-501, 131+787, 35 L. R. A. [N. S.] 909, 1912C Ann. Cas. 568).

5. Taxes paid—The notice should state the amount claimed for taxes paid prior to the notice (69-223, 72+106). As to taxes paid subsequent to the date of the notice and prior to the sale it is sufficient if the notice states that the premises will be sold to pay the debt "and the taxes, if any, on said premises" (46-164, 47+970, 48+783. See 62-327, 64+906; 65-537, 68+109). Where there is a blanket mortgage constituting a specific lien on several tracts the notice should specify taxes paid on each tract separately (47-221, 49+691). The notice need not specify the years for which the taxes were paid (8-334, 294).

6. Description of premises—A description of the premises in the notice conforming substantially to the description in the mortgage is sufficient (37-530, 35+436; 48-441, 51+382; 66-227, 68+1074).

7. Time of sale—The notice must state the time of sale (45-208, 47+788) and good practice requires that it should state the hour of sale, but that is not imperative (20-448, 402; 20-464, 419).

8. Place of sale—The following have been held a sufficient designation of the place of sale: "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 (18-366, 335); "at the courthouse in the city of St. Paul" (20-453, 407); "at the front door of the courthouse in the city of St. Paul" (20-464, 419); "at the front door of the courthouse in the city of Minneapolis, corner of 2d Ave. S. and 3d St.," the sale being had in a building at such corner used temporarily as a courthouse (37-530, 35+436). A notice designating a place which does not exist is void. Calling a city a village is not fatal (31-125, 16+849).

9. No action or proceeding—It is probably not necessary to state in the notice that no action or proceeding has been instituted to recover the mortgage debt (22-157).

10. Manner of sale—It is sufficient to state that the mortgage will be foreclosed by a sale of the premises pursuant to the statute. It is not necessary to state in what order the sale will be conducted or that it will be in particular parcels (35-499, 29+194).

11. Alteration—A material alteration of the notice during the course of publication is fatal (4-433, 335).

8113. Defective notice and service—Curative—Every mortgage foreclosure sale heretofore made under a power of sale in the usual form contained in any mortgage executed under the laws of the State of Minnesota, and recorded in the office of the proper register of deeds of real property within the limits of this state, is, together with the record of such sale, legalized, and made valid and effective to all intents and purposes, as against the following objections, namely:

First, where the hour of the record of said mortgage, or any assignment thereof in the office of the register of deeds is incorrectly stated in the notice of sale or any of the foreclosure papers, affidavits or instruments.

Second, where the date of the mortgage or any assignment thereof is incorrectly stated in the notice of sale or any foreclosure papers, affidavits or instruments.

Third, where the notice of sale was properly published and the service thereof was made upon the occupant by leaving a true copy thereof with a member of the family of said occupant of suitable age and discretion, who was a resident of said premises, but at the time of such service was not upon said premises. ('05 c. 209 § 1)

Section 2 provides that the act shall not affect pending actions, etc.

8114. Defective notice and service—Curative—Every foreclosure of mortgage by advertisement made heretofore, to-wit: on and between the 25th day of January, 1904, and March 16th, 1904, where the notice of sale recites that the sale will take place at the front door of the court house in a certain town and the court house had previously been located in said town, but prior to such foreclosure proceedings that part of said town in which said court house had been located had been duly incorporated into a village and such court house during all of said foreclosure proceedings was in said village; and where in mortgage foreclosure proceedings the mortgagee foreclosing such mortgage was the sole occupant of the premises foreclosed and no notice of foreclosure sale was served on such occupant, such mortgage foreclosures, if otherwise valid, shall be and hereby are declared to be valid and sufficient for all purposes and shall not be affected in any manner by reason of the irregularities aforesaid. ('09 c. 352 § 1)

Section 2 provides that the act shall not affect pending actions, etc.

8115. Where notice claims amount not due, etc.—Curative—Every mortgage foreclosure sale heretofore made under a power of sale in the usual form contained in any mortgage executed under the laws of the state of Minnesota on real property within the limits of this state, and recorded in the office of the proper register of deeds, is, together with the sale, and the record of such sale, legalized and made valid and effectual to all intents and purposes as against the following objection, namely, where the amount claimed in the foreclosure sale notice includes the amount of a note or notes not then due and which stipulate for a greater rate of interest after maturity than before maturity, and the total amount of said note or notes is as a matter of fact collected at the foreclosure sale and retained by the mortgagee together with the interest stipulated for before maturity without objection at any time during the period of redemption by the mortgagor; provided, that at the time of the foreclosure sale notice there has been a default in the payment of one or more of the notes accompanying the mortgage. ('09 c. 293 § 1)

Section 3 provides that the act shall not affect pending actions, etc.

8116. Same—Action to set aside, when—No action shall be maintained in this state to set aside a mortgage foreclosure sale and the record of the same, wherein the objections mentioned in the first section hereof, after the period of redemption from the foreclosure sale has expired. ('09 c. 293 § 2)

8117. Insufficient publication—Curative—Where any mortgage has been heretofore foreclosed by advertisement in this state and all the requirements of law in relation to such foreclosure have been had and taken pursuant to the requirements of law except that the notice of the mortgage foreclosure sale was only published for five or more successive weeks, the said mortgage foreclosure and the said mortgage foreclosure sale and the record thereof in the office of the register of deeds of the county where the foreclosure was had and each of the same shall be and hereby is validated and declared to be valid and sufficient for all purposes the same as if such publication had been had as required by law, provided that this act shall not affect any action at law or in equity now pending in any of the courts of this state affecting any such foreclosure or foreclosure sale. ('11 c. 210 § 1)

8118. Defective notice—Curative—Where any real estate mortgage has heretofore been foreclosed by advertisement, in this state, and all the requirements of law in relation to such foreclosure have been had and taken, pursuant to the requirements of law, except that although the mortgage fore-

closed had been assigned and the assignment duly placed of record, the notice of mortgage foreclosure sale omitted any mention or description of the assignment, but incorrectly gave the name of the assignee as the mortgagee and which notice of foreclosure was signed by the assignee as mortgagee, the said mortgage foreclosure and the said mortgage foreclosure sale and the record thereof in the office of the register of deeds of the county where the foreclosure was had, and each of the same shall be and the same hereby is validated, and declared to be valid and sufficient for all purposes, the same as if said notice had been made as required by law; provided, that this act shall not affect any action at law or in equity now pending in any of the courts of this state, affecting any such foreclosure or foreclosure sale. ('13 c. 182 § 1)

8119. Attorney to foreclose—Record of power—Whenever an attorney at law is employed to conduct such foreclosure, his authority shall appear by power of attorney executed and acknowledged by the mortgagee or assignee of the mortgage in the same manner as a conveyance, and recorded prior to the sale in the county where the foreclosure proceedings are had. If such attorney be employed on behalf of such mortgagee or assignee by an attorney in fact, his authority shall likewise be evidenced by recorded power. (4461)

A power of attorney which substantially complies with the statute and describes the mortgage with reasonable certainty is sufficient (82-288, 84-1024).

8120. Power acknowledged before attorney—Curative—Every foreclosure of mortgage by advertisement heretofore made where the power of attorney to foreclose the same, provided for by chapter 262 of the General Laws of Minnesota for the year 1897, has been acknowledged before a notary public who is the same person named as the attorney authorized to make such foreclosure, and which attorney has signed as witness to the signature of the person who executed such power of attorney, if otherwise regular, shall be and is hereby declared to be as valid and effectual for all purposes, as if such power of attorney had been duly and properly executed. ('05 c. 317 § 1)

Section 2 provides that the act shall not affect pending actions, etc.

8121. Failure to give or record power—Curative—Every foreclosure of mortgage by advertisement heretofore made where the power of attorney to foreclose the same provided for by chapter two hundred and sixty-two of the General Laws of the state of Minnesota for the year 1897 has not been executed or given, provided such foreclosure was authorized by the owner of said mortgage, or where such power of attorney has been executed and given, but not recorded or filed for record in the office of the register of deeds where the foreclosure is had until after the sale under such mortgage has been completed, such mortgage foreclosure if otherwise regular shall be and hereby is declared to be valid and sufficient for all purposes and shall not be affected in any manner by reason of the failure to have such power of attorney recorded. ('05 c. 67 § 1)

Section 2 provides that the act shall not affect pending actions, etc.

8122. Failure to give or record power—Curative—In every foreclosure of mortgage by advertisement heretofore made, where the power of attorney provided by chapter 262, General Laws 1897, and by section 4461, Revised Laws 1905 [8119], has not been executed, but such foreclosure was authorized by the owner of such mortgage, and a written instrument of satisfaction, signed and acknowledged by the person foreclosing such mortgage, ratifying all acts done by the attorney conducting such foreclosure, shall be recorded before Sept. 1, 1907, in the office of the register of deeds of the county in which such foreclosure was held, or when such power of attorney has been executed, but not filed for record in the register of deeds office of the proper county until after such mortgage foreclosure sale has been completed, every such mortgage foreclosure, if otherwise regular, is hereby declared to be valid. ('07 c. 437 § 1)

Section 2 provides that the act shall not affect pending actions, etc.

8123. Failure to give or record power—Curative—In every foreclosure of mortgage by advertisement heretofore made, where the power of attorney

provided by chapter 262, General Laws 1897, and by section 4461, Revised Laws 1905 [8119], has not been executed, but such foreclosure was authorized by the owner of such mortgage, and a written instrument of ratification, signed and acknowledged by the person foreclosing such mortgage, ratifying all acts done by the attorney conducting such foreclosure, shall be recorded before Sept. 1, 1909, in the office of the register of deeds of the county in which such foreclosure was held, or when such power of attorney has been executed, but not filed for record in the office of the register of deeds of the proper county until after such mortgage foreclosure sale has been completed, every such mortgage foreclosure, if otherwise regular, is hereby declared to be valid. ('09 c. 273 § 1)

Section 2 provides that the act shall not affect pending actions, etc.

8124. Failure to give or record power—Curative—In every foreclosure of mortgage heretofore made, by advertisement, where the power of attorney to foreclose the same, provided for by section 4461 of the Revised Laws of Minnesota for 1905 [8119] has not been executed, or if executed, has not been filed for record or recorded prior to such foreclosure sale, such foreclosure sale, if otherwise regular, shall be, and hereby is, declared to be valid and sufficient for all purposes, and shall not be affected in any manner, by reason of the failure to have such power of attorney recorded, provided, such power of attorney has in fact been executed and recorded in the proper office prior to the passage of this act. ('09 c. 318 § 1)

Section 2 provides that the act shall not affect pending actions, etc.

8125. Failure to record power—Curative—In foreclosure of mortgages heretofore made by advertisement, where the power of attorney to foreclose the same, provided for by section 4461 of the Revised Laws of Minnesota for 1905 [8119], has been executed but has not been recorded prior to such foreclosure sale, such foreclosure sale, if otherwise regular, shall be, and hereby is declared to be valid and sufficient for all purposes and shall not be affected in any manner by reason of the failure to have such power of attorney recorded, provided, such power of attorney has, in fact, been recorded in the proper office between the 15th day of December, 1910 and the 15th day of January, 1911. ('13 c. 132 § 1)

Section 2 provides that the act shall not affect pending actions, etc.

8126. Defective power ratified—Curative—Where any real estate mortgage has heretofore been foreclosed by advertisement in this state, and all the requirements of law in relation to such foreclosure have been had and taken, pursuant to law, except that the power of attorney therein authorizing an attorney to foreclose such mortgage, was executed by a person holding power of attorney from the mortgagee, authorizing him to assign, satisfy or release said mortgage, but containing no provision authorizing him to foreclose the same, but where an additional power of attorney, made by such mortgagee, subsequent to such foreclosure and prior to the passage of this act, has been duly made and filed in the office of the proper register of deeds authorizing such foreclosure and confirming and ratifying all proceedings had therein, under the previous power of attorney, the said mortgage foreclosure sale and the record thereof in the office of the register of deeds of the county where the foreclosure was had, and all powers of attorney relative thereto, and the recording thereof, and each of the same shall be and the same hereby are validated and declared to be valid and sufficient for all purposes; provided, however, that this act shall not affect any action at law or in equity now pending in any of the courts in this state, affecting any foreclosure or foreclosure sale. ('13 c. 360 § 1)

8127. Sale, how and by whom made—The sale shall be made by the sheriff or his deputy at public vendue to the highest bidder, in the county in which the premises to be sold, or some part thereof, are situated, between 9 o'clock a. m. and the setting of the sun. (4462)

1. Not judicial—The sale is in pais and not judicial (18-366, 335; 42-476, 44+985).

2. By whom conducted—The sheriff of a county attached to another for "judicial purposes" is the proper officer to conduct a foreclosure in his county (12-335, 221, 93 Am. Dec. 234). A deputy sheriff may conduct a sale either in his own name or in the name of his principal (41-250, 42+1016; 81-438, 84+327). The sheriff acts ministerially (10-379, 304). Prior

to 1866 either the sheriff or the person named in the mortgage for that purpose might conduct the sale and the person so named was frequently the mortgagee (90-24, 95+451).

3. Presumptively regular—The sheriff is presumed to have discharged his duty in connection with the sale (18-366, 335). The certificate of sale is prima facie evidence of the regularity of the sale (§ 8142).

4. At whose instance—A valid sale can only be had at the instance of the mortgagee, his agent, attorney, executor, administrator, or assignee. The sheriff is not authorized to sell on his own motion or at the instance of the mortgagor (90-24, 95+451). Omission in notice of "a. m." after hour set not fatal (109-492, 124+3, 134 Am. St. Rep. 793).

5. Must be at time advertised—A sale cannot be legally made before the hour named in the notice and ordinarily it cannot be made after the expiration of the hour unless actually commenced within the hour. Whether a sale commenced within the hour and held open until after the hour is invalid depends on the facts of the particular case (90-24, 95+451). Where the notice stated that the sale would take place at 11 o'clock a sale at 15 minutes before 11 was held void (45-208, 47+788).

6. Inverse order of alienation—Purchasers of portions of mortgaged premises if they did not take cum onere, are entitled in equity to have them applied to the satisfaction of the mortgage in the inverse order of alienation. If the mortgagee respects this rule in foreclosure by advertisement the mortgagor and his vendees cannot complain (51-444, 53+706).

7. Resale—If the first sale is abortive a second sale may be had under the same power (31-125, 16+849).

8. Inadequate price—A sale for a grossly inadequate price, coupled with irregularity or fraud, may be set aside (24-417. See 68-323, 71+395, 72+71). But where there is no irregularity in the sale or fraud on the part of the mortgagee, and especially where there is a right of redemption from the sale, mere inadequacy of price is not of itself ground for setting aside a sale (37-530, 35+436).

9. Formal defects disregarded—Mere irregularities in the sale do not affect its validity unless the statute so prescribes or unless they may operate to prejudice some interested party (31-125, 16+849).

8128. Postponement—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 the same. (4463)

It is not necessary to wait until the day originally set for the sale to make the postponement (8-432, 385). A notice not published for the prescribed time is not cured by a postponement (21-142). The mortgagee cannot charge the expenses of a postponement made at his instance to the mortgagor (58-84, 59+831). The date of the sale cannot be changed during the course of publication by a mere alteration of the notice; the remedy is either a discontinuance or a postponement under this section (4-433, 335). A publication of a notice of postponement, which is not in itself a sufficient notice of sale, unaccompanied by the original notice of sale, is insufficient (35-449, 29+64).

8129. 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. (4464)

Separate tracts may be sold as a whole if they constitute one farm (18-366, 335). If the premises consist of one tract the whole may be sold, although less than the whole would satisfy the debt, but equity may restrict the sale when justice requires it (4-260, 183). A sale or division of the premises by the mortgagor subsequent to the mortgage does not defeat the legal right of the mortgagee to sell them as a whole, but a court of equity, upon timely application, may require a sale in parcels if justice requires it (4-260, 183; 10-379, 304; 35-499, 29+194; 42-476, 44+985, 8 L. R. A. 50; 51-444, 53+706; 62-265, 64+816). The mortgagee is not bound, at his peril, to ascertain whether any of the mortgaged lands have been alienated or subsequently incumbered. In order to impose upon him the duty to regard equities arising subsequent to the mortgage he must have knowledge of the facts or notice sufficient to put him upon inquiry (35-499, 29+194). A sale of separate tracts in one parcel is not void but merely voidable on a showing of fraud or prejudice (42-476, 44+985, 8 L. R. A. 50; 44-353, 46+559; 51-444, 53+706; 89-319, 94+1085, 1135. See 93-457, 101+966; § 7940); and this rule is not affected by the fact that part of the tracts constitute a homestead (89-319, 94+1085, 1135). Where a single instrument constitutes in effect several separate mortgages on several separate lots to secure several separate sums of money, a sale of all the lots together as one tract for a gross sum is void (38-349, 37+792. See § 8112 note 4). Government subdivisions are not decisive in determining whether premises consist of one tract (6-192, 123. See 32-7, 19+83). The fact that tracts are described separately in the mortgage is not decisive as to whether they should be sold as a whole or separately (6-192, 123; 18-366, 335; 24-417). A sale of land as one tract and for a gross sum is not void simply because it includes a tract not covered by the mortgage (31-125, 16+849; 31-500, 18+452). If the certificate does not show that separate tracts were not one farm the sale will be presumed regular (18-366, 335).

8130. Foreclosure for instalment—Where a mortgage is given to secure the payment of money by instalments, if the mortgaged premises consist of

separate and distinct farms or tracts, each instalment, either for principal or interest, may be taken and deemed to be a separate and independent mortgage, and such mortgage for each such instalment may be foreclosed in the same manner and with like effect as if a separate mortgage were given for each of such subsequent instalments; and a redemption from any such sale by the mortgagor shall have the like effect as if the sale for such instalment had been made upon an independent mortgage. In such case there shall be sold only such farms or tracts as are sufficient to satisfy the instalment then due, with interest, taxes paid, and costs of sale. Where a mortgage is given to secure the payment of money by instalments, either of principal or interest, if the mortgaged premises consist of a single farm or tract, the whole shall be sold. In either case, the proceeds of sale, after satisfying the instalment due, with interest, taxes paid, and costs of sale, shall be applied towards the payment of the residue of the sum secured by such 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 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. (4465)

Under Comp. Stat. c. 75 § 3 only instalments subsequent to the first could be foreclosed separately (8-67, 44). Under this section a sale of the entire tract mortgaged for a single instalment exhausts the lien of the mortgage. There can be a second sale to satisfy a subsequent instalment only when there remains land not sold at the first sale (26-309, 4+39; 26-338, 3+986, 6+486; 29-53, 11+143; 69-469, 72+707, 65 Am. St. Rep. 576; 74-345, 77+214). Under G. S. 1866 c. 81 § 3 the rule was otherwise (20-106, 92; 26-547, 6+350). But if the owner or his assign annuls the sale for a first instalment by redeeming, a second sale may be had for another instalment (4-172, 117; 27-175, 6+489; 30-395, 15+676). Failure to apply proceeds as directed by statute does not invalidate foreclosure, nor by operation of law cancel first note; amount received not being sufficient to pay entire debt (101-417, 112+628, 118 Am. St. Rep. 631).

8131. Surplus—In all cases not provided for in § 8130, 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, with interest, taxes paid, and costs of sale, the surplus shall be paid over by such officer, on demand, to the mortgagor, his legal representatives or assigns. (4466)

A junior mortgagee is entitled, in preference to the mortgagor, to receive the surplus, or at least sufficient to satisfy his mortgage (34-545, 26+907; 37-74, 33+122. See 14-97, 68; 49-469, 52+46; 74-344, 77+234), and this is so although his claim is not yet due (55-437, 57+142). The surplus belongs to the same persons and is subject to the same liens as the land at the time of the sale. A mortgagor held entitled to the surplus as against a judgment docketed against him subsequent to the sale (75-21, 77+434). Taxes paid subsequent to the sale cannot be deducted as against the mortgagor (65-537, 68+109; 69-223, 72+106). It is the duty of the sheriff, if he has no notice of the equities of third parties, to turn the proceeds of the sale over to the mortgagee to the extent of satisfying the whole mortgage (83-37, 85+919, 85 Am. St. Rep. 444). The right to recover a surplus is a chose in action independent of the equity of redemption (75-21, 77+434). Surplus on foreclosure for instalment held applicable to instalments not yet due (26-338, 3+986, 6+486; 26-547, 6+350). If there are no subsequent liens the mortgagor is entitled to the surplus. It is the duty of the mortgagee to pay over any surplus to the persons entitled to the same and if he fails to do so he is chargeable with interest (26-547, 6+350; 75-21, 77+434).

8132. 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. (4467)

Who may purchase—In the absence of statutory authority the mortgagee is regarded as a trustee for sale, who cannot, except by express authority of his cestui que trust, purchase the mortgaged property (4-25, 11; 4-32, 15; 17-61, 40). Under Comp. St. c. 75 § 9 it was held that the mortgagee could not purchase unless the sale was conducted by the sheriff or his deputy (6-168, 104; 8-435, 386). Executors may purchase (4-25, 11; 17-61, 40), but a sale cannot be made to the estate of a deceased person (81-454, 84+323). The mere fact that the mortgagee is the administrator of the estate of the mortgagor does not prevent him from purchasing (85-152, 88+433). The mortgagee must purchase "fairly and in good faith" (24-417). A mortgagee who purchases stands in the same position as any other purchaser (21-132). When a trustee purchases the trust property in his own name, the purchase is not void but voidable. The mortgagor cannot object (4-25, 11. See 74-208, 77+42; 74-538, 77+428; 85-152, 88+433).

8133. Certificate of sale—Record—Effect—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, executed in the same manner as a conveyance, containing:

1. A description of the mortgage.
2. A description of the property sold.
3. The price paid for each parcel sold.
4. The time and place of the sale, and the name of the purchaser.
5. The time allowed by law for redemption.

Such certificate shall be recorded within twenty days after such sale, and when so recorded, upon expiration of the time for redemption, shall operate as a conveyance to the purchaser or his assignee 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. (4468)

THE CERTIFICATE

1. Necessity of—The execution of the certificate is an essential part of the sale. While rights and liabilities may attach at the date of the sale, yet the sale is not consummated until the proper certificate is executed, acknowledged and recorded (37-530, 35+436; 63-517, 65+941; 73-90, 75+1034). Nothing but a certificate can pass the title. A sale in fact without a certificate does not pass it, though it may give the purchaser a right to one. To a recorded certificate a party entitled to redeem must look to ascertain when to redeem, and how much he must pay for the purpose (35-234, 28+220). An action may be maintained to compel the sheriff to execute a certificate (54-499, 56+172, 40 Am. St. Rep. 354).

2. When executed—The provision that the certificate shall be executed and recorded within twenty days after the sale may be merely directory as to time, yet, as the provision for filing the affidavit of costs and disbursements is mandatory, a party cannot extend the time for filing such affidavit by failing to procure and record his certificate within twenty days after the sale (63-517, 65+941. See 44-353, 46+559; 47-581, 50+823). A delay of the sheriff in executing the certificate does not impair the rights of the purchaser (54-499, 56+172, 40 Am. St. Rep. 354).

3. Recording—Failure to record the certificate within twenty days does not render the sale void (47-581, 50+823. See 63-517, 65+941; § 8134). Recording a certificate ten months after the sale held sufficient under 1876 c. 39 (44-353, 46+559). An unrecorded assignment of a certificate held subordinate to a judgment lien (59-285, 61+144). A certificate executed and delivered but not recorded does not pass the title (73-90, 75+1034).

4. Form and sufficiency—It must describe the mortgage (20-453, 407; 47-417, 50+528) and the property sold (31-500, 18+452; 35-234, 28+220; 85-411, 89+320, 89 Am. St. Rep. 566. See 48-441, 51+382). When a deputy sheriff conducts the sale he may execute the certificate either in his own name or in the name of his principal (41-250, 42+1016; 81-438, 84+327). It is not necessary that it should be stated in the body of the certificate that the sale was made by the sheriff as such (18-366, 335). A statement in a certificate that "the above described premises are subject to redemption within the time and according to the statute in such case made and provided" is sufficient (24-161. See 47-417, 50+528). An instrument in the form of a deed but containing all the essentials of a certificate held sufficient, although it did not state that the land was subject to redemption (47-581, 50+823). A certificate issued to the estate of a deceased person conveys no title (81-454, 84+323). An error as to the amount of the secured note and the date of its execution in a certificate under 1862 c. 19 § 3 held not fatal (47-417, 50+528).

RIGHTS AND LIABILITIES OF PURCHASER

5. Nature of interest during redemption period—The fee does not pass from the mortgagor to the purchaser until the expiration of the redemption period (4-172, 117; 7-167, 110; 14-289, 216, 100 Am. Dec. 222; 24-315; 27-175, 6+489; 31-232, 17+372; 43-172, 45+11; 57-465, 59+495; 67-436, 70+3; 73-90, 75+1034; 85-152, 88+433). There is no technical term to define the interest of the purchaser during the redemption period (43-172, 45+11. See 34-458, 26+631, 57 Am. Rep. 68). It is anomalous (54-499, 56+172, 40 Am. St. Rep. 354). It is a purely statutory interest (50-315, 52+897). It is not an estate (4-172, 117; 7-167, 110; 25-9). It is not an interest in real estate within the meaning of the statute authorizing actions to determine adverse claims (25-9) and yet it is an interest in real estate to the extent that it passes by deed (38-2, 35+469; 53-350, 55+555; 88-284, 92+1117. See 31-232, 17+372) and by statute it is made subject to levy as real estate (see § 8145). It is personal property (4-172, 117; 7-167, 110; 24-315, 31 Am. Rep. 346. See 38-2, 35+469)—a lien on real property (7-167, 110; 67-160, 69+715, 1069). In many respects the interest of the purchaser is the same as that of the mortgagee before sale (14-289, 216, 100 Am. Dec. 222; 24-315, 31 Am. Rep. 346), but not in all respects (43-172, 45+11; 67-160, 69+715, 1069; 67-436, 70+3). The purchaser has a lien on the premises to the amount of the purchase price (21-132; 28-75, 9+173; 43-172, 45+11; 48-223, 50+1038; 67-436, 70+3), but he has something more than a mere right to receive back his purchase money and interest. He has a right to acquire absolute title to the land unless it is redeemed within the time allowed by law by one who has a right under the statute to redeem; and he cannot be deprived of this right by one who is not a lawful redemptioner (43-172, 45+11; 74-237, 77+42, 73 Am. St. Rep. 343; 96-234, 104+897, 1 L. R. A. [N. S.] 835, 113 Am. St. Rep. 622). He is not an assignee of the mortgage or a creditor of the mortgagor (21-132. But see note 9 infra). His interest is the same as that of the purchaser at an execution sale during the

period of redemption (88-284, 92+1117). Where mortgagee was purchaser, and before expiration of redemption period agreed with mortgagor to extend time of payment beyond such period, held that the foreclosure was annulled. (116-266, 133+797, Ann. Cas. 1913A, 854).

6. Charged with notice of title—A purchaser is bound to know the condition of the title which he purchases; and if the mortgage contains no covenants of title, and the title proves defective, he has no claim on the mortgagor to make it good. What he buys is the title which the mortgagor had at the time of the execution of the mortgage and the amount of his bid is presumed to be determined with reference to that fact. When the mortgage contains covenants of title which run with the land different considerations apply (52-23, 53+867). He is charged with notice of what property the mortgage covers and what property may be properly sold (31-125, 16+849). He is charged with notice of the rights of any person other than the mortgagor in possession (26-194, 2+688). If the mortgage was void the purchaser acquires no title (28-464, 10+775). The mortgagee cannot make that good and effectual by a sale which was unlawful and void in its inception (31-495, 18+450).

7. Protected by the recording act—The purchaser has a right to rely on the title as disclosed by the records (see 33-224, 22+381; 65-508, 68+107). A bona fide purchaser who has recorded his certificate is not affected by the fact that the mortgage was in fact paid at the time of the foreclosure, if there was no release or satisfaction on record (22-532; 27-396, 7+826; 46-148, 48+769, 24 Am. St. Rep. 201). Possession of the mortgaged premises is not notice of an unrecorded release (22-532). The purchaser is charged with notice of equities appearing on the face of the record (30-4, 13+907).

8. Title rests on mortgage—The title of the purchaser relates back to and takes effect by virtue of the mortgage, which is, in fact, the efficient instrument by which the title is transferred from the mortgagor to the purchaser (41-250, 42+1016; 65-531, 68+113, 60 Am. St. Rep. 495). The purchaser acquires just what the mortgagee has the right to sell under the power—no more and no less (28-496, 31+84). The mortgage must be sufficient to operate as a conveyance as soon as the equity of redemption is barred by the sale (39-378, 40+255). The mortgage ripens into a perfect title through the process of foreclosure (54-499, 56+172, 40 Am. St. Rep. 354). The sale transfers all the interest of the mortgagor in the premises as described in the mortgage (31-500, 18+452).

9. Succeeds to rights of mortgagee—The purchaser succeeds to the equitable interest of the mortgagee, and when no redemption is made this interest draws to it the subordinate legal title of the mortgagor, and his title then stands precisely as if the mortgage had been an absolute conveyance at its date; or, in other words, the mortgage ripens into a perfect title through the process of foreclosure (54-499, 56+172, 40 Am. St. Rep. 354). Even though the sale is void as against the mortgagor and his privies it passes to the purchaser the rights of the mortgagee as such. He is regarded as an equitable assignee of the mortgage (30-197, 14+889; 32-191, 19+734; 35-124, 27+497; 39-39, 38+765, 12 Am. St. Rep. 613; 43-172, 45+11; 44-199, 46+332; 47-221, 49+691; 56-126, 57+454; 63-272, 65+459; 85-411, 89+320, 89 Am. St. Rep. 566. See 88-392, 93+309). He does not succeed to other securities held by the mortgagee (56-353, 57+1061).

10. Effect of mortgagee bidding in—If the mortgagee is the purchaser his debt, as between him and the mortgagor, is paid; but it is not true that either his mortgage, as a muniment of title, or his interest in the mortgaged premises, is discharged or extinguished. He simply receives a conditional conveyance of the premises for the payment of his debt, and continues to have a lien on the premises for the amount of the purchase price, which was applied in payment of his debt. His interest in the premises is practically the same after the sale as before, except the purchase price must be repaid to him by the mortgagor, with interest, within the year, or his title under his mortgage becomes absolute (7-167, 110; 14-289, 216, 100 Am. Dec. 222; 67-436, 70+3; 85-152, 88+433). He becomes a purchaser instead of a contract creditor, and holds the property by virtue of his bid and upon conditions fixed by law for its redemption (56-353, 57+1061; 67-160, 69+715, 1069). He stands in no different or better position than a stranger who purchases (56-353, 57+1061).

11. Sale of separate tracts to different persons—The rights of purchasers of different tracts are distinct (21-132).

12. Right to crops, rents and profits—If the purchaser is in possession with the rights of a "mortgagee in possession" he is entitled to the crops raised by himself, but is accountable for the rents and profits (32-191, 19+734). If he is out of possession he is not entitled, during the year of redemption, to crops or timber, but he may restrain waste (12-335, 221, 93 Am. Dec. 234; 77-175, 79+676). When he obtains possession after the expiration of the redemption period he is entitled to all the crops then growing thereon and thereafter he may maintain an action in the nature of replevin or trover therefor, if they are severed and carried away by another (71-136, 73+719). Crops sown by the mortgagor or his tenant during the year of redemption and harvested after the expiration of the year, but before the purchaser takes possession, belong to the mortgagor or tenant (73-58, 75+756, 72 Am. St. Rep. 603), and an injunction will not issue to restrain him from removing them (71-136, 73+719). An agreement held to give the mortgagor the right to crops maturing after the expiration of the redemption period (71-133, 73+625). During the year of redemption the purchaser is not entitled to the rents and profits (50-315, 52+897; 50-319, 52+897), and if he is in possession he must account for them (32-191, 19+734).

13. Right to chattels—After the expiration of the redemption period chattels on the premises belong to the purchaser as against a stranger (55-91, 56+579).

14. As a mortgagee in possession—Title by adverse possession—The lien of the mortgage is not extinguished until it merges in the legal estate when that passes by lapse of time. It passes to the purchaser to the extent of the purchase price, so that if he goes into possession in good faith under the foreclosure, even though it is invalid, he is regarded

as a mortgagee in possession whether he takes possession with or without the consent, either express or implied, of the mortgagor (30-197, 14+889; 39-39, 38+765, 12 Am. St. Rep. 613; 43-172, 45+11; 63-272, 65+459; 85-411, 89+320, 89 Am. St. Rep. 566). A vendee of the purchaser has the same rights as the purchaser in this regard (30-197, 14+889; 32-191, 19+734). If he remains in possession until the right of redemption by the mortgagor is barred he becomes invested with a legal title (39-39, 38+765, 12 Am. St. Rep. 613; 44-199, 46+332; 45-376, 48+3; 85-411, 89+320, 89 Am. St. Rep. 566), and may redeem from the foreclosure of a senior lien (85-411, 89+320, 89 Am. St. Rep. 566).

15. Right to sue on covenants in mortgage—A covenant against incumbrances runs with the land and a purchaser may maintain an action thereon (65-531, 68+113, 60 Am. St. Rep. 495; 68-538, 71+699). He buys the title as warranted and guarded by the covenants in the mortgage (52-23, 53+867; 56-353, 57+1061; 65-531, 68+113, 60 Am. St. Rep. 495; 68-538, 71+699. See 53-212, 54+1115; 59-230, 61+25).

16. Purchase money mortgage—The purchaser takes free from all claims or liens arising through the mortgagor (36-93, 30+441).

17. Easements—The purchaser acquires all rights, privileges and easements appurtenant and necessary to the enjoyment of the premises although they were acquired by the mortgagor subsequent to the mortgage (83-377, 86+420. See 74-286, 77+1).

18. Possession of mortgagor not adverse—31-500, 18+452.

19. Right to fixtures—34-458, 26+631, 57 Am. Rep. 68.

20. Liability for purchase price—54-499, 56+172, 40 Am. St. Rep. 354.

21. Nature of title after redemption period—At the expiration of the redemption period if no redemption is made, the purchaser succeeds to the title of the mortgagor as it was at the date of the mortgage and as conveyed by the mortgage (20-106, 92; 23-13; 21-132; 57-465, 59+495). He acquires just the interest of the mortgagor—no more and no less (28-496, 11+84). He acquires every right or interest held by the mortgagor in and to the mortgaged property, together with all subsequently acquired rights, easements and privileges, which are essential to the full enjoyment of the property (83-377, 86+420). He is the owner and entitled to all the rights of ownership (see 52-409, 54+370).

8134. Failure to record—Curative—No certificate heretofore executed under and by virtue of Laws 1878 c. 53 s. 11 (G. S. 1894 s. 6038) shall be deemed invalid because not recorded within the twenty days mentioned in that section; and the record of every such certificate heretofore recorded after the expiration of said twenty days is hereby legalized, with the same effect as if such certificate had been executed, acknowledged, and recorded within such twenty days: Provided, that this section shall not apply in any case in litigation at the time of the taking effect of the Revised Laws. (4469)

8135. Failure to record—Curative—That no certificate heretofore executed under and by virtue of section eleven, chapter eighty-one, title one, Statutes of Minnesota, being section 6038 General Statutes of 1894 [8133] shall be deemed invalid by reason of the same not having been made, executed, proved or acknowledged and recorded within the twenty days mentioned in said section; and the record of all such certificates heretofore executed, proved or acknowledged and recorded after the expiration of the said twenty days is hereby legalized and made valid, and said record shall have the same force and effect as if said certificates had been executed, proved or acknowledged and recorded within the said twenty days; provided, that nothing herein contained shall be construed to apply to cases now pending which involve the legality or validity of any such certificate of sale. ('05 c. 289 § 1)

8136. Premises in more than one county—Record—If any mortgage covering real estate in more than one county be foreclosed by proceedings had in one county, and the mortgage debt be thereby paid, in whole or in part, there may be recorded by the register of deeds of the other county a certified copy of the certificate of sale and other foreclosure proceedings of record in the county in which the foreclosure proceedings were had. (4470)

8137. Execution after expiration of term—Where the term of office of the sheriff or deputy who made the sale expires within twenty days thereafter, and before he has executed the certificate required by law, he may execute and acknowledge the same in like manner and with like effect as if his term had not expired. (4471)

See 47-581, 50+823.

8138. Perpetuating evidence of sale—Any party desiring to perpetuate the evidence of any sale made in pursuance of this chapter may procure:

1. 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.

2. An affidavit or return of service of such notice upon the occupant of the mortgaged premises, to be made by the officer or person making such service, or, in case the premises were vacant and unoccupied at the time when such service must be made, an affidavit or return showing that fact, to be made by the officer or person attempting to make such service.

Such affidavits and returns shall be recorded by the register of deeds, and they and the records thereof, and certified copies of such records, shall be prima facie evidence of the facts therein contained. (4472)

The affidavits are prima facie evidence of the facts stated therein—at least of facts authorized to be stated (8-342, 301; 20-453, 407; 35-449, 29+64). They are not evidence of the mortgage and power (see 37-76, 33+440). They are not essential to the validity of the sale (20-453, 407; 41-250, 42+1016). An affidavit of publication must state all the statutory requirements of publication (35-449, 29+64; 20-453, 407). The affidavit of a publisher is sufficient (20-448, 402; 46-535, 49+257). If defective affidavits are filed correct ones may be subsequently filed (20-453, 407). Comp. St. c. 84 § 61, requiring an affidavit of publication to state that the notice attached was "taken from the newspaper" in which it is alleged to have been published held not applicable (18-66, 51; 18-366, 335).

8139. Entry in record—A note referring to the page and book where the evidence of any such sale is recorded shall be made by the register in the margin of the record of the mortgage. (4473)

8140. Affidavit of costs—Within ten days after the filing for record of the certificate of sale, the party foreclosing or his attorney shall make and file for record with the register of deeds an affidavit containing a detailed bill of the costs and disbursements of the foreclosure, including attorney's fees, and setting forth that the same have been absolutely and unconditionally paid or incurred. (4474)

The statute is constitutional (75-21, 77+434) and mandatory (60-393, 62+381; 61-527, 63+1040; 63-517, 65+941; 65-133, 67+793; 84-388, 87+1020). Failure to file the affidavit does not invalidate the sale (37-530, 35+436; 60-393, 62+381; 63-517, 65+941; 84-62, 86+877). The ten days begin to run, not from the day of sale, but from the time the sale is completed by the execution and recording of the certificate (63-517, 65+941). Hence a party may have thirty days from the sale in which to file the affidavit (84-62, 86+877). He cannot extend the time by failing to procure and record his certificate of sale within twenty days after the sale (63-517, 65+941). Whether the affidavit is evidence of the facts required to be stated therein is an open question. It is not evidence of the facts not required to be stated (65-537, 68+109). On failure to file the affidavit within the required time an action will lie for the recovery of all costs and disbursements of the sale (60-393, 62+381). It is not a defence to such an action that a subsequent mortgagee is entitled to the surplus (65-315, 67+1004; 84-388, 87+1020). The one year limitation of § 8141 is not applicable (65-133, 67+793). A complaint held sufficient (84-388, 87+1020). Mortgagor held not estopped by requesting the mortgagee to assign his certificate of sale to a third party (75-20, 77+435). No demand is necessary before bringing suit. Defendant held chargeable with interest (75-21, 77+434).

8141. Excessive costs or interest—At any time within one year after the sale, the mortgagor, his heirs or assigns, may recover from the owner of the mortgage at the time of foreclosure three times the amount of any sums charged as costs or disbursements on such foreclosure, but not absolutely paid, unless such amounts have been paid to the mortgagor or his assigns. (4475)

The action may be brought immediately after the sale without waiting for the expiration of the redemption period (28-6, 8+829). Good faith is no defence. The burden of proof is on the plaintiff (58-84, 59+831). The remedy is not exclusive (61-285, 63+730) and the one year limitation is not applicable to an ordinary action for the surplus (65-133, 67+793). One of the objects of requiring an affidavit of costs and disbursements is to enable the mortgagor to determine whether he has a cause of action under this section (60-393, 62+381). Whether a cause of action under this section is assignable is an open question (65-471, 67+1143). A mortgagee is liable for treble the costs of postponement of sale charged to the mortgagor (65-471, 67+1143). This section is not applicable to excessive charges actually paid or incurred (58-84, 59+831; 60-393, 62+381).

8142. Certificate as evidence—Every sheriff's certificate of sale 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 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. (4476)

The statute is constitutional (41-250, 42+1016). A certificate has no force as evidence unless it conforms substantially to the statute (35-408, 29+121). It is only prima facie and not conclusive evidence (35-449, 29+64; 41-250, 42+1016; 45-208, 47+788; 45-526, 48+402). It is not even prima facie evidence of the mortgage or power and before it is admissible in proof of title preliminary proof is necessary that the sale was made under a power to sell "contained in a mortgage" (37-76, 33+440). It is prima facie evidence that the notice of sale

was properly published (41-250, 42+1016); that the sale was regular as regards selling in parcels (18-366, 335); and that a postponement was duly made (73-283, 76+34). Whatever facts are necessary to make the certificate intelligible with respect to the matters which it is required to set forth are necessarily contained in it and evidence (18-66, 51). A certificate executed by a deputy sheriff in his own name has the same force as a certificate in the name of the sheriff (41-250, 42+1016). It seems that a certificate has no force as evidence even of regularity until after the period of redemption has expired (84-34, 86+757). G. S. 1894 § 6054 cited (98-261, 108+11).

8143. Action to set aside for certain defects, etc.—No such sale shall be held invalid or be set aside by reason of any defect in the notice thereof, or in the publication or service of such notice, or in the proceedings of the officer making the sale, unless the action in which the validity of such sale is called in question be commenced, or the defence alleging its invalidity be interposed, with reasonable diligence, and not later than five years after the date of such sale: Provided, that persons under disability to sue when such sale was made, by reason of being minors, insane persons, idiots, or persons in captivity or in any country with which the United States is at war, may commence such action or interpose such defence at any time within five years after the removal of such disability. (4477)

The statute is inapplicable to an action of ejectment against a mortgagor who has remained in actual possession (35-449, 29+64). It is valid, as a statute of limitations if the purchaser goes into possession (45-376, 48+3). It is only applicable to certain specified "defects." It is not applicable where there is an entire want of authority to exercise the power of sale, as where a stranger assumes to foreclose (38-197, 36+333, 8 Am. St. Rep. 661), or an assignment is not recorded (51-174, 53+458; 51-181, 53+460). It presupposes the existence of the conditions authorizing the exercise of the power and deals only with certain specified irregularities in its exercise (51-174, 53+458). If construed literally it includes all defects in the notice (47-221, 49+691. See 64-190, 66+268). It has been held applicable where the notice of sale did not state the amount due on each lot where the mortgage constituted a specific lien on each of several lots (47-221, 49+691); where the notice of sale was not published the requisite time (45-376, 48+3; 54-141, 55+1117), where the notice contained an inaccuracy as to the date when the mortgage was recorded (45-376, 48+3). The statute operates to validate defective sales (90-503, 97+384). If the defect in the sale is one of those specified in the statute the mortgagor must move with great promptness. Knowledge of the foreclosure puts him on inquiry as to the regularity of the proceedings (35-499, 29+194; 46-202, 48+767; 51-444, 53+706; 64-190, 66+268). If the defect is one of substance the same promptitude is not required (38-349, 37+792; 51-174, 53+458), but even in such cases the mortgagor may lose his title by laches as against bona fide purchasers of the record title. The adverse possession of such purchasers charges him with notice and imposes on him the duty to act promptly (38-197, 36+333, 8 Am. St. Rep. 661. See 38-211, 36+338; 61-178, 63+495). The mortgagor may enforce his legal remedies until barred by the statute of limitations (44-446, 46+908).

8144. Action to set aside, etc.—Limitation—No such sale shall be held invalid or set aside unless the action in which its validity is called in question be commenced, or the defence alleging its invalidity be interposed, within fifteen years after the date of such sale: Provided, that persons under disability as provided in § 8143 may commence such action or interpose such defence within the time therein provided. This section shall not affect or prejudice the rights of any bona fide purchaser. (4478)

See 90-503, 97+384.

8145. Interest of purchaser—Attachment or judgment—The interest acquired upon 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 and sold on execution in the same manner. (4479)

7-167, 110; 31-232, 17+372.

8146. Redemption by mortgagor—When lands have been sold in conformity with the preceding sections of this chapter, the mortgagor, his personal representatives or assigns, within twelve months after such sale, may redeem such lands, as hereinafter provided, by paying the sum of money for which the same were sold, with interest from the time of sale at the rate provided to be paid on the mortgage debt, not to exceed ten per cent. per annum, and, if no rate be provided in the mortgage, at the rate of six per cent., together with any further sums which may be payable pursuant to § 8172. (4480)

RIGHT OF REDEMPTION GENERALLY

1. An incident of what mortgages—A right or equity of redemption is an inseparable incident of every mortgage (11-22, 5). But see 116-4, 133+91, 36 L. R. A. (N. S.) 1132, Ann. Cas. 1913A, 622. It is not affected by a default (11-22, 5). It exists in spite of ex-

press term in the mortgage to the contrary (15-69, 50. See 7-49, 34). It is not dependent upon possession (23-328). A mortgage must be deemed to have been made with reference to the statutory right of redemption by creditors (29-53, 11+143). Foreclosure sale of franchises and real and personal property of a public service corporation without right of redemption (116-4, 133+91, 36 L. R. A. [N. S.] 1132, Ann. Cas. 1913A, 622).

2. Right favored—85-411, 89+320, 89 Am. St. Rep. 566; 98-203, 108+846.

3. General object of statute—The statute providing for redemption is calculated to save the property of debtors from being sacrificed and to enable debtors to retain their property, or, if they shall fail to do so, then to secure its application, so far as may be, to the payment of the demands of the creditors (29-53, 11+143).

4. How lost—It is not lost by a surrender of the note and an advancement of an additional sum by the lender equal, with the previous loan, to the agreed value of the land mortgaged (33-362, 23+538).

5. Statute must be followed—After a foreclosure by advertisement the only right of redemption, by mere act of parties, is that given by statute and can be exercised only as prescribed in the statute (26-100, 1+834; 37-71, 33+123).

6. Release—The mortgagor may sell or release his equity of redemption to the mortgagee (34-118, 24+369; 39-137, 39+309; 86-255, 90+387; 89-432, 95+216, 769). Such a release after condition broken is tantamount to a foreclosure and operates as payment of the mortgage debt to the extent of the value of the property (29-226, 13+34).

7. A proceeding in pais—51-417, 53+719.

8. Sheriff acts as officer of law—14-289, 216, 100 Am. Dec. 222; 16-210, 184; 20-268, 239; 21-132; 28-75, 9+173; 65-391, 67+1024; 82-251, 84+786.

9. Right to redeem and right to foreclose how far reciprocal—15-69, 50; 20-264, 237; 23-328; 26-365, 4+611; 39-39, 38+765, 12 Am. St. Rep. 613; 63-156, 65+357.

10. Assignment of certificate as a redemption—23-345, 9+868; 29-53, 11+143; 29-226, 13+34; 36-42, 29+675; 74-208, 77+42; 75-20, 77+435.

11. Amount required to redeem from mortgage—A mortgagor has a right to redeem from a mortgage by paying the mortgage debt and interest and he cannot be required, as a condition of such redemption, to pay any other debt due from him to the mortgagee (13-194, 183; 82-307, 84+1022).

REDEMPTION BY MORTGAGOR OR ASSIGN

12. Who is an assign—A junior mortgagee is not an assign within the meaning of the statute (37-71, 33+123; 74-345, 77+214. See 90-114, 95+762), nor is the purchaser at the foreclosure of a junior mortgage (43-172, 45+11). The term "assigns" has been defined to include "grantees of the mortgage, and those acquiring his title otherwise than by descent" (37-71, 33+123); "those to whom the property, or the interest of the mortgagor therein is transferred" (18-497, 444). A purchaser at an abortive foreclosure sale who has gone into possession and remained until after the redemption period has expired may redeem as an "assign" from the foreclosure of a senior lien (85-411, 89+320, 89 Am. St. Rep. 566). Any person having either the mortgagor's title or a subsisting interest under it, as, for example, a tenant for years, a person beneficially interested, a tenant by curtesy or one who has the statutory interest superseding dower and curtesy, may redeem as an "assign" (85-411, 89+320, 89 Am. St. Rep. 566). A wife has such interest in her husband's real estate that she may redeem (25-516; 29-53, 11+143; 56-523, 58+156; 74-273, 77+139).

13. Who is mortgagor—18-497, 444.

14. By part owner—An owner of an undivided half of a tract sold as a whole can only redeem the whole and the effect of his redemption is to annul the sale as to the whole (46-481, 49+250). See 115-290, 132+210. A redemption by one of two joint owners will inure to the benefit of both (36-42, 29+675. See 32-455, 21+478).

15. By wife—Where plaintiff wife redeemed land of her husband, and they were afterwards divorced, and he conveyed his interest to defendant, the redemption annulled the sale, and defendant owned land; but she was entitled to subrogation to equitable lien for amount paid (104-267, 116+472, 17 L. R. A. [N. S.] 981, 15 Ann. Cas. 313).

16. Time in which to redeem—Extension—The right to redeem expires absolutely at the expiration of the twelve months and cannot be revived (57-465, 59+495). The time to redeem stated in the certificate of sale does not control in case of conflict with the statute (10-174, 141). If the last day falls on Sunday redemption may be made on Monday (48-223, 50+1038). A court cannot extend the period of redemption (51-417, 53+719), but the parties may by agreement (see 25-516; 28-267, 9+772; 32-14, 18+830; 46-84, 48+458). A payment to the sheriff through a third party held sufficient although the sheriff did not receive the money until after the redemption period (82-251, 84+786).

17. Amount required to redeem—26-100, 1+834; 67-160, 69+715, 1069.

18. Effect of non-redemption—Non-redemption within the statutory time extinguishes all the estate and interest of the mortgagor and consequently of all persons claiming under him (29-53, 11+143; 36-93, 30+441).

8147. Redemption by creditor—If no such redemption be made by the mortgagor, his personal representatives or assigns, the senior creditor having a lien, legal or equitable, upon the mortgaged premises, or some part thereof subsequent to the mortgage, may redeem within five days after the expiration of said twelve months; and each subsequent creditor having a lien in succession, according to priority of liens, within five days after the time allowed the prior lienholder, respectively, may redeem by paying the amount aforesaid and all liens prior to his

own held by the person from whom redemption is made; provided, that no creditor shall be entitled to redeem unless within said twelve months he file for record notice of his intention to redeem with the register of deeds of the county or counties where the mortgage is recorded. (R. L. § 4481, amended '09 c. 243 § 1)

1. General plan—The general object of the statute providing for redemption by creditors is to make the land bring its utmost value, by means of what might be termed an auction sale among creditors, preserving to each his right according to the seniority of his lien. The aim is to conduct this sale for the benefit of both creditors and debtor, the creditors being interested in realizing out of the property as much as possible towards payment of their claims, and the debtor being interested in having as much of his debts as possible paid out of it (28-345, 9+868. See 29-53, 11+143; 29-226, 13+34; 56-60, 57+320).

2. Who may redeem as creditors—The following may redeem as a creditor: a junior mortgagee (20-268, 239; 21-132; 37-71, 33+123; 47-434, 50+475; 48-223, 50+1038; 90-114, 95+762); an assignee of a junior mortgagee (48-223, 50+1038; 74-345, 77+214); a purchaser at a foreclosure sale of a junior mortgage (21-132; 43-172, 45+11); a creditor of the grantee of the mortgagor (28-48, 8+905); an attaching creditor on a contract express or implied (45-341, 48+187, 12 L. R. A. 741. See 30-366, 15+673); a judgment creditor (27-18, 6+373; 28-345, 9+868; 29-53, 11+143; 29-226, 13+34; 30-161, 14+795; 36-136, 30+458; 42-476, 44+985, 8 L. R. A. 50; 45-341, 48+187, 12 L. R. A. 741; 50-508, 52+922; 53-1, 55+113; 56-60, 57+320; 70-380, 73+165; 74-237, 77+42, 73 Am. St. Rep. 343; 78-373, 81+11); an assignee of a judgment against the mortgagor although the assignment is not filed under G. S. 1894 § 5431 (70-380, 73+165. See § 8148); a creditor acquiring a lien pending the time of redemption (20-106, 92); a creditor having a lien on a part of the land sold (21-132; 27-18, 6+373; 29-53, 11+143; 36-136, 30+458). To entitle a creditor to redeem he must have something more than the general right common to all creditors to have the general property of the debtor applied to the payment of his debts; he must have a right, either in law or equity, to have the specific property appropriated to the satisfaction of his claim in exclusion of other claims subsequent in date to his (29-203, 12+530; 65-246, 68+18). It is not necessary that he should have a personal claim against the debtor; it is sufficient if he has a special claim on the specific land sold. The statute has in view the party's relation and interest in respect to the land, and not in respect to any particular person (28-48, 8+905; 43-172, 45+11). A general creditor of a deceased person, although his claim has been allowed against the estate by the probate court has no lien within the statute and cannot redeem. A redemption for the estate must be made by the executor or administrator (29-203, 12+530; 65-246, 68+18). A party having an equitable mortgage in the form of an absolute deed may redeem without first having obtained a judicial determination that the deed is a mortgage (77-54, 79+594, 77 Am. St. Rep. 664). A junior mortgagee in a mortgage on which the registry tax has not been paid cannot redeem (119-193, 137+973, 42 L. R. A. [N. S.] 146).

3. Notice of intention—If a notice is recorded it is immaterial that it is not filed (27-18, 6+373). An assignee of a lien may redeem under a notice filed by his assignor (48-223, 50+1038). Defects in a notice are waived if the purchaser accepts the redemption money (50-310, 52+864; 73-361, 76+199). A notice filed before the creditor actually acquires his lien is ineffectual although he subsequently and during the year acquires the lien described (71-308, 74+139; 96-234, 104+897, 1 L. R. A. [N. S.] 835, 113 Am. St. Rep. 622). Where foreclosure is by action the notice must be filed with the clerk of court (48-223, 50+1038). The notice is not a part of the redemptioner's muniments of title (50-310, 52+864). Fraudulent notices may constitute a cloud on title removable by action (63-120, 65+258). A notice of intention to redeem as "a judgment debtor" does not authorize a redemption by an owner (95-286, 104+7).

4. Tacking subsequent liens—The purchaser at a foreclosure sale cannot tack subsequent liens held by him so as to compel the holder of a lien subsequent to his to pay them in redeeming from the foreclosure sale unless such purchaser puts himself in the line of redemptioners, by filing notice of redemption to redeem from his own sale under his subsequent liens and files at the proper time affidavits of the amount due on his subsequent liens (28-345, 9+868; 29-434, 13+668; 43-172, 45+11; 58-291, 59+1020; 95-286, 104+7). But it is not necessary for him to pay to himself the amount necessary to redeem from himself, or to issue to himself any certificate of redemption, and he need not redeem from himself through the sheriff (58-291, 59+1020).

5. Right statutory—The right of a creditor to redeem is purely statutory (21-132; 28-345, 9+868; 37-71, 33+123; 51-417, 53+719), but the statute is to be construed with reference to equity practice (28-345, 9+868; 65-246, 68+18).

6. Construction of statute—The statute is remedial and to be construed liberally in favor of the mortgagor and redeeming creditors (20-132; 29-53, 11+143). It is to be construed with reference to its general purpose (28-345, 9+868); and former equity practice (28-345, 9+868; 65-246, 68+18).

7. Statute must be substantially followed—There must be a substantial compliance with the requirements of the statute (21-132; 37-71, 33+123; 47-434, 50+475; 51-417, 53+719. See as requiring a strict compliance 28-345, 348, 9+868; 70-380, 73+165). Merely formal defects may be overlooked (21-132).

8. What law governs—The law of the date of the execution of the mortgage governs (4-483, 375; 8-387, 344; 10-174, 141; 27-18, 6+373; 28-496, 11+84; 36-136, 30+458).

9. Five day period—72-287, 75+376; 80-76, 82+1103.

10. Order among successive creditors—Creditors redeem according to the priority of their liens. There is no provision in the statute to determine the rights of respective creditors in regard to redemption, except by the priority of their respective liens (29-203,

12+530). The purchaser at the sale cannot object that a creditor redeems out of the statutory order or prematurely (72-287, 75+376; 80-76, 82+1103). The "senior creditor" means the senior creditor who redeems (28-345, 9+868). Priority of liens is determined by time of record, without reference to nature of estates in land, or any part thereof, owned by mortgagors (105-348, 117+512).

11. From what redemption made—The redemption is a redemption of the land sold from the sale and not a redemption of the land mortgaged from the mortgage. The redemption is made from the purchaser as purchaser, not as assignee of the mortgage (21-132).

12. Nature of right—The creditor's right of redemption is the right to buy the purchaser's interest, at the price paid by him, with interest from the date of the sale (21-132).

13. Extension of time to redeem—A court has no discretionary power to extend the period of redemption (51-417, 53+719). The time cannot be extended to await the determination of a suit in equity for an accounting (47-434, 50+475). It may be extended by agreement of the parties (see 25-516, 43-66, 44+886; 47-434, 50+475; 89-319, 94+1085, 1135), but a creditor's right to redeem cannot be prejudiced by an agreement between the mortgagor and the purchaser at the sale (70-380, 73+165).

14. When right accrues—The right of a creditor to redeem does not accrue until the mortgagor's right of redemption has terminated and the title of the holder of the certificate of sale has become, as against the mortgagor, perfect and absolute (28-345, 9+868; 29-226, 13+34; 57-465, 59+495). But the purchaser may waive a permanent redemption by a creditor (54-308, 56+34; 90-114, 95+762. See 72-287, 75+376).

15. Upon sale of separate tracts—21-132.

16. A vested right—27-18, 6+373; 36-136, 30+458; 41-388, 43+78.

17. Attacking creditor's lien—29-53, 11+143; 42-476, 44+985, 8 L. R. A. 50; 45-341, 48+187, 12 L. R. A. 741; 48-223, 50+1038; 53-1, 55+113; 56-60, 57+320; 63-120, 65+258; 70-380, 73+165; 74-237, 77+42; 74-273, 77+139.

18. Waiver of irregularities—Though the purchaser cannot, so far as concerns the passing of the legal title by redemption, waive by parol the existence of a lien giving a right to redeem, nor a proper certificate of redemption, he may waive any irregularity in the intermediate steps to effect redemption. He may waive any defect in the filed notice of intention to redeem or the failure of the creditor to file an affidavit of the amount due on his lien and he does so by accepting the redemption money (21-132; 50-310, 52+864; 73-361, 76+199). The objection that a redemption was prematurely made may be waived (54-308, 56+34; 90-114, 95+762. See 72-287, 75+376; 80-76, 82+1103). The sheriff cannot waive defects as against the purchaser (21-132).

19. A purchaser for value—A creditor redeeming is a purchaser for a valuable consideration (30-537, 16+449; 46-156, 48+677, 24 Am. St. Rep. 206; 72-352, 75+761, 595, 71 Am. St. Rep. 488), and as such is protected from a resulting trust of which he has no notice (30-537, 16+449). Rule that possession is notice applies to one redeeming from foreclosure sale of land which, in actual possession of person other than mortgagor (98-39, 107+744, 13 L. R. A. [N. S.] 49).

20. Effect of non-redemption—Failure to redeem from a sale made on a second lien by the holder of a subsequent and subordinate lien cuts off his right to redeem from a sale made on the first lien. The sale on a second lien, whether made before or after that on a first lien, has the effect, unless it is itself cut off by the first sale, or unless it is redeemed from, to cut off all liens and interests subject to it (30-161, 14+795; 31-264, 17+476; 50-508, 52+922; 54-308, 56+34; 72-287, 75+376; 73-236, 75+1046; 95-286, 104+7). Where defendant foreclosed his mortgage and purchased for an amount which left a surplus, and afterwards plaintiff issued execution on his judgment, which was a second lien, and purchased the premises at the execution sale for the amount of his judgment and costs, and execution was returned satisfied, and he never redeemed from the foreclosure sale, he was not entitled to recover the surplus from defendant (104-340, 116+645).

21. Cited (104-267, 116+472, 17 L. R. A. [N. S.] 981, 15 Ann. Cas. 313).

8148. 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:

1. A copy of the docket of the judgment, or of the deed 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, or the original deed or mortgage, with the certificate of record indorsed thereon.

2. Any assignment necessary to establish his claim, verified by the affidavit of himself or a subscribing witness thereto, or some person acquainted with the signature of the assignor. If the redemption is under an assignment of a judgment, the assignment shall be filed in the court rendering the judgment as provided by law, and the person so redeeming shall produce a certified copy thereof and of the record of its filing, and the copy of the docket shall show that the proper entry was made upon the docket.

3. 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 person redeeming shall cause the documents so required to be produced to be filed with the register of deeds, who shall indorse thereon the date and hour of filing, and shall preserve the same in his office for one year thereafter, for which service he shall be entitled to receive one dollar: Provided, that if such redemption shall be made at any place other than the county seat, it shall be sufficient forthwith to deposit such documents in the nearest postoffice, addressed to such register, with the postage prepaid. (4482)

1. Proof of right to redeem—The object of the statute is to furnish evidence to the officer or purchaser that the party proposing to redeem has the right to do so under the statute and to provide the evidence whereby a second or other redemptioner may know the amount to be paid to a previous one. The statute is to be liberally construed in favor of the redemptioner (8-496, 441; 21-132; 28-345, 9+868). The production of the original instrument evidencing the lien, with the certificate of record indorsed thereon, is a sufficient compliance with the statute which requires the production of a certified copy of such instrument (21-132; 41-314, 43+66; 91-124, 97+651). The holder of a subsequent judgment lien may redeem from an execution sale by paying the proper amount into the hands of the proper court and it is not necessary for him to produce to the clerk certified copies of the judgment docket, files and records upon which redemption is based, but it is sufficient if the clerk has the knowledge thereof, and the original records, files and papers are called to his attention (91-124, 97+651). The redemptioner need not produce all the deeds constituting his chain of title from the mortgagor (20-268, 239). When the redemption is made by the mortgagor or owner it is not necessary to produce and file certified copies of the documents showing his title and right to redeem. The production of the original records to the officer is sufficient (41-314, 43+66). An affidavit of the amount due is indispensable (21-132). Where a mortgagee sells the note but executes no assignment of the mortgage securing the same, and subsequently repurchases the note, the equitable transfers of the beneficial interest in the mortgage effected by the sale and repurchase of the debt, are not assignments which need be produced (40-531, 42+467, 4 L. R. A. 196, 12 Am. St. Rep. 754). Failure to produce the papers required by the statute is waived by accepting the redemption money (73-361, 76+199). The redemption papers are not a part of the redemptioner's muniments of title (50-310, 52+864). The purchaser at the foreclosure sale cannot tack subsequent liens unless he files an affidavit of the amount due thereon (see § 8147 note 4). The failure to file the affidavit of the amount due is waived by accepting the redemption money (73-361, 76+199). No provision is made for a formal notice of redemption (7-432, 347). The refusal of the clerk to recognize a party's right to redeem will not be allowed to prejudice him (41-156, 42+867). The sheriff is not required to notify the mortgagor of a redemption (65-391, 67+1024). Proof of heirship of one entitled to redeem is sufficient without production of any document or record, where it does not appear that probate proceedings have been completed (98-203, 108+846).

2. Amount necessary to redeem—The sheriff, in receiving money paid on redemption, acts as the officer of the law, not as the agent of the party. If he receives too much or too little, or from one not entitled to redeem, that cannot prejudice the party holding the certificate of sale. It is the business of the party redeeming to see that he deposits with the sheriff the proper amount and if the amount is not correct he must bear the consequences (14-239, 216, 100 Am. St. Rep. 222; 16-210, 184; 18-497, 444; 21-132; 28-75, 9+173; 53-346, 55+557; 65-391, 67+1024). Where the redemptioner pays to the sheriff a gross sum for the redemption and sheriff's fees, and it is accepted by the sheriff as sufficient and the sum is sufficient to satisfy the purchaser's claim, it is a good redemption; the shortage, if any, must be deducted from the sheriff's fees (48-223, 50+1038). The senior creditor redeeming is required to pay only the amount for which the property was sold, with interest. But subsequent redemptioners must pay in addition prior liens held by prior redemptioners (28-345, 9+868). Where a mortgagee foreclosed for more than the amount due and a second mortgagee was required to pay such amount in order to redeem it was held that the latter might recover from the former the excess (6-240, 158). Junior creditor must pay amount shown by record to be due. Statute provides no method by which he may determine validity of prior liens or proper amount. He must pay according to record, and if lien fraudulent, or amount padded, he must resort to other proceedings to recover damages (105-348, 117+512).

3. Tender of amount necessary to redeem—8-496, 441; 21-319; 26-100, 1+834; 27-18, 6+373; 28-75, 9+173; 41-156, 42+867; 63-484, 65+948; 76-196, 78+1110.

4. Filing the redemption papers—Prior to 1881 Ex. S. c. 3 there was no provision for recording or filing the redemption papers (21-132, 141; 50-310, 52+864). The statute is intended for the protection of junior redemptioners and they alone, if any one, can take advantage of a non-compliance with its provisions (40-531, 42+467, 4 L. R. A. 196, 12 Am. St. Rep. 754; 50-310, 52+864).

5. Payment in what—If the sheriff accepts without objection treasury or national bank notes (20-268, 239) or a check on a bank (41-314, 43+66) the payment is good.

8149. Certificate of redemption—Record—The person or officer from whom such redemption is made shall make and deliver to the person redeeming a certificate executed and acknowledged in the same manner as a conveyance, containing:

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

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

3. A statement of the claim upon which such redemption is made, and, if upon a lien, the amount claimed to be due thereon at the date of redemption.

If redemption is made by the owner of the property sold, his heirs, personal representatives, or assigns, such certificate shall be recorded within four days after the expiration of the year allowed him for redemption, and, if made by a creditor holding a lien, such certificate shall be recorded within four days after such redemption. Unless so recorded, such certificate shall be void as against any person in good faith redeeming from the same person or lien. (4483)

A certificate of redemption, in substance such as the statute directs, is essential to the passing of the legal title, although the redemptioner may, perhaps, acquire equitable rights without it. That a certificate of redemption upon a lien does not state the amount claimed to be due on the lien will not, as between the purchaser and a subsequent redemptioner, affect a redemption on a subsequent lien made on the assumption that the prior redemption was regular (50-310, 52+864). The sheriff may execute the certificate although the payment is made to the party from whom redemption is made (54-308, 56+84). A certificate is prima facie evidence of the fact of a redemption and of the truth of its recitals so far as they relate to matters required to be stated (27-18, 6+373). In an action to set aside a certificate executed by a sheriff its recitals may be impeached by parol evidence showing that no redemption was in fact made and no money paid to the sheriff (38-2, 35+469). A certificate issued to one not entitled to redeem is a nullity (18-497, 444). The purchaser at the foreclosure sale may tack subsequent liens without issuing a certificate to himself (see § 8147 note 4). In proving a title under a redemption it is sufficient to show such a foreclosure sale as is effectual under the statute to pass the legal title to the purchaser, the lien on which the redemption was made, and a certificate of redemption regular on its face (50-310, 52+864). Certificate of redemption, issued by holder of sheriff's certificate to owner, not filed for record within four days, is void as to second redemption duly made through sheriff, in good faith by junior lienholder, though second redemption be made and certificate thereof filed for record within time limited for recording first certificate (102-460, 113+1064).

8150. Effect of redemption—If redemption is made by the owner of the property sold, his heirs, personal representatives, or assigns, such redemption annuls the sale; if by a creditor holding a lien on the property or some part thereof, the certificate of redemption, executed, acknowledged and recorded as provided in § 8149, operates as an assignment to him of the right acquired under such sale, subject to such right of any other person to redeem as provided by law. (4484)

1. Redemption by owner—A redemption by the owner, his heirs, executors, administrators or assigns, annuls the sale, leaving the property in the same condition as if the mortgage had never been made (18-497, 444; 23-74; 25-516; 29-53, 11+143; 37-71, 33+123). A redemption by a part owner annuls the sale as to the whole tract (46-481, 49+250). Redemption by wife (104-267, 116+472). A sale from which a redemption is made does not affect the lien of the mortgage for other instalments of the mortgage debt (4-172, 117; 27-175, 6+489; 30-395, 15+676). Where the owner assumes to redeem as a creditor under a judgment against a former owner, in law the redemption will be one by an owner and not by a creditor, and its legal effect will be to annul the sale (78-373, 81+11).

2. Redemption by creditor—Redemption by a creditor does not annul the sale but appropriates the benefit of it to the redemptioner, so far as there may be any excess of value in the property beyond what it costs him to make redemption (37-71, 33+123; 57-465, 59+495; 74-345, 77+214). It operates as an assignment of the rights of the purchaser (20-106, 92; 28-345, 9+868; 41-156, 42+867; 42-366, 44+256). In other words, the redemptioner is subrogated to the rights of the purchaser (23-74; 27-18, 6+373; 29-53, 11+143; 36-136, 30+458; 70-380, 73+165). It does not extinguish the lien on which it is made, but the first redemptioner is subrogated to the right of the purchaser with the lien of the first redemptioner added, and so on, as each successive redemption is made. The last redemptioner acquires all intervening redemption liens and may enforce them against the land for his protection and reimbursement. The lien on which a redemption is made is not extinguished by the fact that the value of the property is equal to the amount of the lien with the amount paid for redemption added (21-132; 50-508, 52+922). But a redemption by a creditor satisfies his debt to the extent of the value of the property, less the amount paid to effect redemption. Thus a redemption by a judgment creditor of property exceeding in value the amount of the judgment and the amount paid to effect redemption satisfies the judgment and extinguishes the right to make further redemptions by virtue thereof (29-226, 13+34; 72-352, 75+595, 761, 71 Am. St. Rep. 488).

8151. Foreclosure pending action to set aside mortgage—Redemption—Whenever an action is brought wherein it is claimed that any mortgage as to the plaintiff or person for whose benefit the action is brought is fraudulent or void, or has been paid or discharged, in whole or in part, if such mortgage has been foreclosed by advertisement, and the time for redemption from the foreclosure

sale will expire before final judgment in such action, the plaintiff or beneficiary having the right to redeem, for the purpose of saving such right in case the action fails, may deposit with the sheriff before the time of redemption expires the amount for which the mortgaged premises were sold, with interest thereon to the time of deposit, together with a bond to the holder of the sheriff's certificate of sale, in an amount and with sureties to be approved by such sheriff, conditioned to pay all interest that may accrue or be allowed on such deposit if the action fail. He shall, in writing, notify such sheriff that he claims such mortgage to be fraudulent or void, or to have been paid or discharged, in whole or in part, as the case may be, and that such action is pending, and direct him to retain such money and bond until final judgment. In case such action fails, such deposit shall operate as a redemption of the premises from such foreclosure sale, and entitle the plaintiff to a certificate thereof. Such foreclosure, deposit, bond, and notice shall be brought to the attention of the court by supplemental complaint in the action, and the judgment shall determine the validity of the foreclosure sale, and the rights of the parties to the moneys and bond so deposited, which shall be paid and delivered by the sheriff as directed by such judgment, upon delivery to him of a certified copy thereof. The remedy herein provided shall be in addition to other remedies now existing. (4485)

BY ACTION

8152. 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 in this chapter otherwise provided. (4486)

1. **Object of action**—21-308, 18 Am. Rep. 398; 29-226, 13+34.
2. **A proceeding in personam**—24-358; 44-97, 46+315, 9 L. R. A. 152, 20 Am. St. Rep. 547; 52-67, 53+1130.
3. **A judicial proceeding**—4-298, 215; 44-97, 46+315, 9 L. R. A. 152, 20 Am. St. Rep. 547.
4. **Default necessary**—49-13, 51+621.
5. **For instalment—Coupon interest note**—43-16, 44+670.
6. **Subsequent action against omitted parties**—14-220, 158; 44-290, 46+350; 69-5, 71+694; 78-88, 80+864.
7. **Parties plaintiff**—58-381, 59+971; 74-538, 77+428; 80-165, 83+54, 50 L. R. A. 170, 81 Am. St. Rep. 249; 81-263, 83+991.
8. **Parties defendant**—3-67, 30; 5-304, 240; 21-308; 24-358; 31-129, 16+694; 33-357, 23+527; 35-179, 28+217; 36-59, 29+887, 1 Am. St. Rep. 635; 44-290, 46+350; 45-167, 47+653; 47-74, 49+398, 645; 52-148, 53+1134, 20 L. R. A. 535, 38 Am. St. Rep. 530; 56-523, 58+156; 63-263, 65+451; 69-5, 71+694.
9. **Pleading**—3-67, 30; 3-202, 133; 4-141, 93; 4-197, 139; 22-157; 25-234; 35-470, 29+170; 39-378, 40+255; 58-39, 59+822; 62-298, 64+896; 73-6, 75+759; 73-332, 76+57. Plea of tender (103-510, 115+642, 116+112).
10. **Counterclaim**—7-356, 282; 17-403, 381; 72-108, 75+19.
11. **Joinder of causes of action**—5-304, 240; 73-6, 75+759; 75-49, 77+414.
12. **Defences**—6-186, 119; 17-403, 381; 30-395, 15+676; 31-213, 17+341; 39-39, 38+765, 12 Am. St. Rep. 613; 39-378, 40+255; 49-13, 51+621; 52-67, 53+1130; 62-265, 64+816; 73-90, 75+1034; 73-397, 76+24; 80-165, 83+54, 50 L. R. A. 170, 81 Am. St. Rep. 249.
13. **Issues which may be litigated**—21-308, 18 Am. Rep. 398; 31-129, 16+694; 36-59, 29+887, 1 Am. St. Rep. 635; 44-97, 46+315, 9 L. R. A. 152, 20 Am. St. Rep. 547; 44-290, 46+350; 46-481, 49+250; 61-226, 63+493; 63-263, 65+451; 74-484, 77+298; 539.
14. **Jury trial**—30-395, 15+676; 63-269, 65+454.
15. **Burden of proof**—74-344, 77+234.
16. **Notice of election—Treating whole amount due**—23-337; 26-347, 4+231.
17. **Findings**—40-489, 42+395; 74-484, 77+298, 539.
18. **Accounting**—31-129, 16+694.
19. **Statute of limitations**—See § 7698.

8153. Application of former sections—The provisions of §§ 8129, 8130, 8139, 8145, 8148-8150, and of 8133 so far as they relate to the form of the certificate of sale, shall apply to and govern the foreclosure of mortgages by action. (4487)

8154. Judgment—Transcript to sheriff—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 to sell the same according to the provisions of law relating to the sale of real estate on execution, and to make

report to the court. A certified transcript of the judgment shall be delivered to the sheriff, and shall be his authority for making the sale. (4488)

1. The judgment generally—The judgment prescribed by this section is not a personal judgment which may be docketed and become a lien before sale of the mortgaged premises and the application of the proceeds upon the debt as prescribed by § 8160 (58-365, 59+1086. See 19-17, 1). If the plaintiff fails to establish his lien and right to foreclose but establishes a cause of action for the recovery of money he may have an ordinary personal judgment with all its incidents (58-365, 59+1086; 70-252, 73+155). In all cases of foreclosure it is necessary to have a judgment adjudging the amount due on the mortgage in order to determine the sum to be realized out of the security; and, in cases where the plaintiff is not entitled to a personal judgment for the debt, this is its only purpose and effect (46-422, 49+237). The judgment prescribed by this section determines all the issues in the action, and provides just the relief to which the plaintiff is entitled. When it is entered all controversy as to the respective rights between the plaintiff and the several defendants with respect to the mortgage and the right to enforce it is determined. All that follows it—the sale, report of sale, confirmation, etc.—are merely to carry into effect and enforce the determination of the rights of the parties which the judgment makes (27-376, 7+732). The judgment should not bar interests prior to the mortgage (70-71, 72+827, 73+1; 87-1, 91+14. See 21-308, 18 Am. Rep. 398; 58-39, 59+822; 71-147, 73+716). The judgment is protected by the same presumptions of regularity and jurisdiction as an ordinary judgment. It is not subject to collateral attack for irregularity. It is a final judgment (14-537, 408; 19-452, 393). It binds the parties and their privies by estoppel as an ordinary judgment and is conclusive as to the right to foreclose including the validity of the mortgage (67-131, 69+708). It should direct the sale of only so much of the land as may be necessary to satisfy the judgment (4-260, 183). The title sold rests on the judgment. There is no going behind the judgment to ascertain if the mortgage was sufficient to operate as a conveyance (39-378, 40+255). Entry of judgment in a "Decree Book" held not fatal (19-17, 1). A homestead may be set off by the judgment (31-213, 17+341). A second mortgagee cannot have a decree of foreclosure conditional on a mortgagor redeeming from a sale under the first mortgage (4-525, 410).

2. Who not bound by judgment—Persons not made parties and not in privity with parties are unaffected by the judgment, the action being in personam (14-220, 158; 23-13; 24-358; 37-197, 33+561; 40-381, 42+86; 44-97, 46+315, 9 L. R. A. 152, 20 Am. St. Rep. 547; 56-523, 58+156; 75-231, 77+786; 78-88, 80+864. See 37-208, 34+23; 41-477, 43+329). Parties as to whom the action is dismissed are not bound (41-477, 43+329; 45-431, 48+8). A mortgagee pendente lite held bound by the judgment (51-129, 53+1).

3. Modification of judgment—67-12, 69+474; 70-243, 73+161; 70-252, 73+155.

4. Opening default judgment—40-463, 42+391; 67-131, 69+708.

5. The sale—Where a mortgage covers an exempt homestead and additional lands, the mortgagor is entitled to have the non-exempt property first sold and applied to the satisfaction of the mortgage debt (40-193, 41+1031). It is a judicial sale (4-298, 215). It should be for no more than necessary to satisfy the mortgage (4-260, 183). Where a judgment directs a sale to be made by the sheriff it may be made by his deputy (14-537, 408).

6. Distribution of proceeds of sale—If a mortgage secures several notes held by different parties the proceeds, if insufficient to pay all the notes in full, should, in the absence of an agreement to the contrary, be applied pro rata towards the payment of all the notes without regard to the time of their transfer or maturity (30-4, 13+907; 31-280, 17+620. See 33-224, 22+381). If the sheriff distributes the proceeds as directed by the judgment he is not liable (34-270, 25+604). A prior mortgagee held not entitled to have his lien and taxes paid out of the proceeds (71-147, 73+716). Where a mortgage given to secure two notes is foreclosed the proceeds should be applied ratably on both debts (5-523, 417).

8155. Separate tracts—When it appears that the sale of the whole of the mortgaged premises in one parcel will be most beneficial to the interests of the parties, the court may adjudge that the same be so sold, notwithstanding that they consist of distinct farms or tracts. (4489)

An order for the sale of premises as one tract sustained on appeal, it not appearing by the record that the premises consisted of several tracts (76-386, 79+319).

8156. Purchase by mortgagee, etc.—The mortgagee, or any one claiming under him, may fairly and in good faith bid off the premises at such 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. (4490)

See note to § 8132; 74-538, 77+428.

8157. Surplus—When the sale is for cash, if, 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. If such surplus remains in court for three months without being applied for, the judge may direct it to be put out at interest, subject to the order of the court, for the benefit of the persons entitled thereto, to be paid to them upon order of the court. (4491)

See § 8131 and § 8154 note 6.

8158. Foreclosure for instalment—Dismissal—Stay—When an action is brought for the foreclosure of a mortgage on which there is due any interest, or any portion of the principal, and there are other portions to become due subsequently, the action shall be dismissed, upon the defendant bringing into court, at any time before the judgment of sale, the principal and interest due, with costs. If, after such judgment of sale, the defendant brings into court the principal and interest due, with costs, the action shall be stayed; but the court shall enter judgment of foreclosure and sale, to be enforced by a further order upon a subsequent default in the payment of any portion of the principal or of interest thereafter to become due. (4492)

8159. Report—Confirmation—Resale—Upon the coming in of the report of sale, the court shall grant an order confirming the sale, or, if it appears upon due examination that justice has not been done, may order a resale on such terms as are just. If the sale is confirmed, the sheriff shall forthwith execute the proper certificate of sale, which shall be recorded within twenty days after such confirmation. (4493)

1. **Confirmation of sale—**14-138, 104; 14-220, 158.

2. **Resale—**14-138, 104; 14-220, 158; 36-388, 31+353.

8160. 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 such 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. (4494)

See § 8154 note 1.

8161. Failure to record within 20 days—Curative—In all sales wherein heretofore the report of sale has been confirmed by order filed in the action, and the certificate of sale was thereafter executed in proper form, and recorded more than twenty days thereafter, such certificate and the record thereof are hereby legalized, with the same effect as if such certificate had been executed, acknowledged, and recorded within such twenty days: Provided, that this section shall not apply to any case in litigation at the time of the taking effect of the Revised Laws. (4495)

8162. No report, order of confirmation or final decree prior to 1886—Curative—That in all cases of a foreclosure of a real estate mortgage by action, or of an attempted foreclosure of a real estate mortgage by action, prior to the year 1886, under a duly rendered judgment, order or decree of a court of competent jurisdiction, where an official certificate of sale has been made, executed, acknowledged and delivered by the proper officer to the proper party, and such certificate has been filed for record, and actually recorded in the office of the register of deeds of the county in which the real estate so foreclosed upon, is situate, but in which action no report of sale nor order confirming the sale has been made or filed, nor any final decree made or entered therein, such foreclosure is hereby declared to be in all respects legal, valid and effective, as though such report of sale has been duly made, and an order had been duly made by the court confirming the same, and a final decree made and entered therein, and the certificate of sale in such action is hereby declared to operate as a conveyance to the purchaser at the sale, and to his assigns or successors in interest in the property sold, of all the right, title and interest of the mortgagor, his heirs or assigns in and to the premises described therein, which the mortgagor had at the date of the mortgage so foreclosed, from and after the expiration of one year from the date of said certificate where no redemption has been made from said sale, without any report of sale, or order confirming the same, or final decree or other act, proceeding or conveyance whatsoever; provided, that nothing herein contained shall be construed to apply to actions now pending, which involve the validity of any such sale. ('07 c. 125)

8163. No report, order of confirmation or final decree prior to 1890—Curative—That in all cases of a foreclosure of a real estate mortgage by action, or of an attempted foreclosure of a real estate mortgage by action, prior to the year 1890, under a duly rendered judgment, order or decree of a court of competent jurisdiction, where an official certificate of sale has been made, executed,

acknowledged and delivered by the proper officer to the proper party, and such certificate has been filed for record, and actually recorded in the office of the register of deeds in the county in which the real estate so foreclosed upon, is situate, but in which action no report of sale or order confirming the sale has been made or filed, nor any final decree made or entered therein, such foreclosure is hereby declared to be in all respects legal, valid and effective, as though such report of sale had been duly made, and an order had been duly made by the court confirming same, and a final decree entered therein, and the certificate of sale in such action shall operate as a conveyance to the purchaser at the sale, and to his assigns or successors in interest in the property sold, of all the right, title and interest of the mortgagor his heirs or assigns, in and to the premises described therein, which the mortgagor had at the date of the mortgage so foreclosed, from and after the expiration of ninety days from the passage of this act, where no redemption is made from said sale, without any report of sale or order confirming the same, or final decree or other act, proceeding or conveyance whatsoever; provided, that nothing herein contained shall be construed to apply to actions now pending which involve the validity of any such sale. ('11 c. 219 § 1)

8164. No order of confirmation or final decree prior to 1898—Curative—That in all cases of a foreclosure of a real estate mortgage by action, or of an attempted foreclosure of a real estate mortgage by action, prior to the year 1898, under a duly rendered judgment, order or decree of a court of competent jurisdiction, where an official certificate of sale has been made, executed, acknowledged and delivered by the proper officer to the proper party, and such certificate has been filed for record, and actually recorded in the office of the register of deeds in the county in which the real estate so foreclosed upon is situate, and in which action a report of sale has been duly made and filed, but no order confirming the sale has been made or filed, nor any final decree made or entered therein, such foreclosure is hereby declared to be in all respects legal, valid and effective as though an order had been duly made by the court confirming said sale and the report thereof, and the certificate of sale in such action shall operate as a conveyance to the purchaser at the sale, and to his assigns or successors in interest in the property sold, of all the right, title and interest of the mortgagor, his heirs or assigns, in and to the premises described therein, which the mortgagor had at the date of the mortgage so foreclosed, from and after the expiration of ninety days from the passage of this act, where no redemption is made from said sale, without any order confirming the sale and the report thereof, or final decree or other act, proceeding or conveyance whatsoever; provided, that nothing herein contained shall be construed to apply to actions now pending which involve the validity of any such sale. ('13 c. 512 § 1)

8165. No affidavit of nonresidence prior to 1910—Curative—Where in a foreclosure of a real estate mortgage by action or in an attempted foreclosure of a real estate mortgage by action prior to 1910, the defendants or any of them were non-residents and the summons in said action was served on the non-resident defendants, but it does not affirmatively appear that the affidavit showing the non-residence of the defendants and other matters as required by section 5204, General Statutes 1894 or section 4111, Revised Laws 1905 [7737], was ever filed, but a judgment of foreclosure has been rendered and the property covered by said mortgage attempted to be foreclosed has been sold under such judgment and the sheriff has issued his certificate of sale and the sale has been confirmed by the court, such sheriff's certificate or the record thereof in the office of the register of deeds of the proper county shall be conclusive evidence of the filing of such affidavit, and no such judgment or sale shall be deemed invalid or be set aside unless the action or proceeding in which the validity of such judgment or sale is called in question or the defense alleging its invalidity be interposed with reasonable diligence and not later than five (5) years after such sale. ('13 c. 468 § 1)

Section 2 provides that the act shall not affect pending actions, etc.

8166. No order of confirmation—Curative—Certain mortgage foreclosure proceedings legalized—In every foreclosure of mortgage heretofore made by action where the sheriff's certificate of sale was dated not more than ten

days prior to the date of the order of the court confirming the report of such foreclosure sale, as provided by section 4493 of the Revised Laws of Minnesota for 1905 [8159], such foreclosure sale if otherwise regular, shall be, and hereby is, declared to be valid and sufficient for all purposes and shall not be affected in any manner, by reason of the failure to have the order confirming the report of such foreclosure sale made and issued prior to the execution of the sheriff's certificate of such foreclosure sale. ('13 c. 29 § 1)

Section 2 provides that the act shall not affect pending actions, etc.

8167. Redemption by mortgagor, creditor, etc.—The mortgagor, or those claiming under him, within one year after the date of the order of confirmation, may redeem the premises sold, or any separate portion thereof, by paying the amount bid therefor, with interest thereon from the time of sale at the rate provided to be paid on the mortgage debt, not to exceed ten per cent. per annum, and, if no rate be provided in the mortgage, at the rate of six per cent., together with any further sum which may be payable pursuant to § 8172. Creditors having a lien may redeem in the order and manner in this chapter hereinbefore specified, but no creditor shall be entitled to redeem unless within said year he files with the clerk notice of his intention to redeem. (4496)

The period of redemption cannot be shortened or extended by the court (5-508, 401; 28-18, 8+873). A junior mortgagee not a party to the action cannot redeem from the sale, but must, if he redeems at all, redeem from the entire mortgage by paying the whole of it (23-13. See 45-431, 48+8). Redemption by wife of fee owner (115-143, 132+202).

8168. Delivery of possession—When possession of lands is wrongfully withheld after expiration of the time of redemption, the court may compel delivery of possession to the party entitled thereto by order directing the sheriff to effect such delivery. (4497)

36-388, 31+353; 60-6, 61+818; 75-241, 77+831; 76-268, 79+103.

8169. Strict foreclosure—Judgment for the strict foreclosure of a mortgage may be given when such remedy is just or appropriate, but in such case no final decree of foreclosure shall be rendered until the lapse of one year after the judgment adjudging the amount due on such mortgage. (4498)

Strict foreclosure is rarely justifiable (21-101; 28-18, 8+873; 69-5, 71+694). By a strict foreclosure the conditional title acquired by the mortgage is made absolute in the mortgagee, the property being thus applied directly to the satisfaction of the debt (29-226, 13+34). Prior to 1870 c. 58 the power to award strict foreclosure was less restricted than at present (4-298, 215; 4-483, 375; 4-499, 390; 7-301, 231; 13-194, 183).

GENERAL PROVISIONS

8170. Attorney's fees—The mortgagor may, in the mortgage, covenant to pay or authorize the mortgagee to retain an attorney's fee in case of foreclosure; but such fees shall not exceed the following amounts, and any provision for fees in excess thereof shall be void to the extent of the excess:

1. When the debt secured by the mortgage does not exceed five hundred dollars, the fee shall not exceed twenty-five dollars.
2. When the debt exceeds five hundred dollars, but does not exceed one thousand dollars, the fee shall not exceed fifty dollars.
3. When the debt exceeds one thousand dollars, but does not exceed five thousand dollars, the fee shall not exceed seventy-five dollars.
4. When the debt exceeds five thousand dollars, but does not exceed ten thousand dollars, the fee shall not exceed one hundred dollars.
5. When the debt exceeds ten thousand dollars, the fee shall not exceed two hundred dollars. (4499)

A stipulation in a mortgage for an attorney's fee on foreclosure is valid if inserted in good faith to indemnify the mortgagee for the expense of foreclosure and not as a cover for illegal interest (8-342, 301). The legislature may regulate the amount of the fees as to subsequent mortgages (75-21, 77+434). The fees are not part of the debt secured and the mortgagee has no right to any part of them, except to indemnify himself for such reasonable sum, not exceeding the amount limited by statute, and named in the mortgage, as he actually pays or absolutely and unconditionally incurs (60-316, 62+112). The statute makes the mortgage and the lien created by it security for such fees as well as for the mortgage debt (28-464, 10+775). No fees can be retained if no affidavit of costs and disbursements is filed (60-393, 62+381). The county is entitled to fees where the county attorney forecloses a mortgage held by the county (76-194, 78+1107). A corporation employing a salaried attorney

to foreclose held entitled to fees (60-316, 62+112). An attorney employed by an assignee for the benefit of creditors in connection with foreclosure of a mortgage owned by the assignor held entitled to prove his claim against the estate as a general creditor but not entitled to be paid in full out of the trust estate (73-240, 75+1047). Where an attorney employed to foreclose drew the notice of sale and had it set up in type by the printer it was held that the claim for fees had accrued so that a tender not including them was ineffectual (45-335, 47+1072). The burden of proving fees excessive and unreasonable is on the party claiming them to be so (58-84, 59+831; 60-316, 62+112). When unauthorized fees are included an action as for money had and received will lie (61-285, 63+730; 65-315, 67+1004). When a single mortgage is made a specific lien on several separate tracts the mortgagee may foreclose on each tract separately or on all together in one proceeding. If he adopts the former course he is entitled to fees for each foreclosure (87-179, 91+469); if the latter, but one set of fees (61-285, 63+730; 65-315, 67+1004). The fraudulent insertion of a covenant to pay fees held to invalidate the mortgage (28-464, 10+775). A judgment including fees held not invalidated by the absence of a finding that they were reasonable (64-201, 66+1). An application for a modification of a judgment including fees held properly denied on the ground that the form of judgment had been consented to (67-12, 69+474). The statute is not applicable to the foreclosure of railroad mortgages (58-65, 59+826). Not necessary to prove value of services of counsel, where allowance made at conclusion of trial (103-510, 115+642, 116+112).

8171. May be collected, when—When the mortgage provides for an attorney's fee in case of foreclosure, and an attorney at law of the state is employed to conduct the same, the mortgagee, his heirs, personal representatives or assigns, may, upon foreclosure, collect or retain such fee, but not in excess of the sum provided by § 8170. When no such attorney is employed, if any sum as or for such fee be included in the amount for which the premises are sold, such sum shall be paid in money by the purchaser to the sheriff before the execution of the certificate of sale, and shall be paid by the sheriff to the mortgagor, or those having his estate in the mortgaged premises. (4500)

8172. Foreclosure or execution sale—Taxes, insurance and interest—The purchaser at any sale, upon foreclosure of mortgage or execution or at any judicial sale during the year of redemption, may pay any taxes or assessments on which any penalty would otherwise accrue, and may pay the premium upon any policy of insurance procured in renewal of any expiring policy upon mortgage premises, and may in case any interest upon any prior or superior mortgage is in default or shall become due during such year of redemption pay the same, and in all such cases, the sum so paid, with interest, shall be part of the sum required to be paid to redeem from such sale. Such payments shall be proved by the affidavit of the purchaser, his agent or attorney, stating the items and describing the premises, which must be filed for record with the register of deeds, and a copy thereof shall be furnished to the sheriff at least ten days before expiration of the year of redemption. (R. L. § 4501, amended '09 c. 421; '13 c. 110 § 1)

See 90-169, 95+1114; 91-517, 98+650.

8173. Homestead included in mortgage—Separate sale—In all proceedings to foreclose any mortgage upon real property in this state, if the whole or any part of the homestead of the mortgagor or of any one claiming under him, as such homestead is defined by the laws of this state, shall be included in the real estate described in such mortgage, the person claiming such homestead may, at any time prior to the foreclosure sale, serve or cause to be served upon the sheriff making such sale a notice of such claim which shall designate and describe with reasonable certainty the real estate so claimed and selected as such homestead, which selection shall include the site of the dwelling and its appurtenances, shall be compact in form and shall be so made as not unreasonably to affect the value of the remaining part, which notice together with the proof of service thereof shall be filed for record and recorded in the office of the register of deeds. Upon the service and filing of such notice it shall be the duty of the sheriff, at the time of the sale, to first offer for sale and sell that part of the mortgaged real estate, or so much thereof as is necessary, which is not included in such selected homestead, and thereupon, if the proper purposes of such foreclosure require, he shall offer for sale and shall sell separately that part of the mortgaged real estate included in such selected homestead, provided that if such homestead claimant

§ 8175 ACTIONS BY OR AGAINST PERSONAL REPRESENTATIVES AND HEIRS 1819

shall have prior to such foreclosure made a property homestead selection from his real estate he shall be bound thereby, and cannot change the same for the purposes of such foreclosure. ('07 c. 389)

CHAPTER 84

ACTIONS BY OR AGAINST PERSONAL REPRESENTATIVES AND HEIRS

8174. What causes of action survive—A cause of action arising out of an injury to the person dies with the person of either party, except as provided in § 8175. All other causes of action by one against another, whether arising on contract or not, survive to the personal representatives of the former and against those of the latter. (4502)

1. Held to survive—Mechanic's lien (14-145, 113, 100 Am. Dec. 205); right of ward to an estate (33-220, 22+383); liability for nuisance (38-179, 36+451, 8 Am. St. Rep. 656); liability for personal injury after verdict (55-134, 56+588); cause of action for fraud in exchange of property (66-66, 68+771); liability of stockholder in corporation (80-432, 83+377); liability on bond for maintenance of parents (85-73, 88+418).

2. Held not to survive—Cause of action for death by wrongful act (28-5, 5+875; 32-125, 19+656; 97 Fed. 140, 38 C. C. A. 79); for libel, slander, malicious prosecution and the like (69-30, 71+826); for injury to person (79-377, 82+669); for negligence (92-42, 99+357, 104 Am. St. Rep. 665). A cause of action for malicious attachment held an injury to property, and not to person, so as to pass to trustee in bankruptcy (105-491, 117+926, 21 L. R. A. [N. S.] 727). Claim for damages for destruction of personalty by fire is assignable (117-434, 136+275).

8175. Action for death by wrongful act—When death is caused by the wrongful act or omission of any person or corporation, the personal representative of the decedent may maintain an action therefor if he might have maintained an action, had he lived, for an injury caused by the same act or omission. The action may be commenced within two years after the act or omission. The damages therein cannot exceed seven thousand five hundred dollars, and shall be for the exclusive benefit of the surviving spouse and next of kin, to be distributed to them in the same proportion as personal property of persons dying intestate; but funeral expenses, and any demand for the support of the decedent, duly allowed by the probate court, shall first be deducted and paid. Provided, that if an action for such injury shall have been commenced by such decedent, and not finally determined during his life, it may be continued by his personal representative for the benefit of the same persons and for recovery of the same damages as herein provided, and the court on motion may make an order, allowing such continuance, and directing pleadings to be made and issues framed conformably to the practice in action begun under this section. (R. L. § 4503, amended '11 c. 281 § 1)

1. Right statutory—32-125, 19+656; 92-184, 99+620, 104 Am. St. Rep. 674.

2. Construction and application of statute—The word "wrongful" is not used in the sense of wilful or malicious. An action will lie under the statute for the same kind of act or omission causing death for which the deceased might have maintained an action if the resulting injury had fallen short of death (12-530, 438). Where, after verdict, in action for personal injuries, plaintiff dies, this section does not apply (104-1, 115+949). See note under § 7685. Administrator of one whose death was due to wrongful act of a municipality may maintain action against it for damages consequent thereon (113-55, 129+158, 775, 33 L. R. A. [N. S.] 339, 1912A Ann. Cas. 216).

3. Who may sue—No one is authorized to sue under the statute except the administrator or executor of the deceased (8-97, 72; 28-5, 8+875; 32-125, 19+656; 81-493, 84+842, 52 L. R. A. 354, 83 Am. St. Rep. 395). Special administrator may (108-129, 121+606. See 120-122, 139+300).

4. Non-residents—A non-resident alien who is next of kin may have the benefit of the statute (89-41, 93+1057, 99 Am. St. Rep. 534; 163 Fed. 827, 91 C. C. A. 390).

5. Who is next of kin—A husband held not next of kin of his wife within former statute. Next of kin means the nearest blood relation (70-514, 73+400).

6. Jurisdiction—Actions under foreign statute—Action for death of non-resident resulting from injury received in this state (44-5, 46+79). Action for injury received on river constituting boundary between Wisconsin and Minnesota (30-126, 14+575). Action for injury received in another state when statute of such state gives cause of action (69-476, 72+694, 65 Am. St. Rep. 579). Not necessary that statute in this state should be the same as that of the state in which the accident occurred (31-11, 16+413, 47 Am. Rep. 771; 69-476, 72+694, 65 Am. St. Rep. 579; 78-43, 80+776; 92-184, 99+620, 104 Am. St. Rep. 674, 2 Ann.