

## CHAPTER 580

## FORECLOSURE OF REAL ESTATE MORTGAGES BY ADVERTISEMENT

**580.01 LIMITATION.**

**HISTORY.** 1878 c. 53 s. 1; G.S. 1878 c. 81 s. 1; 1879 c. 21 s. 1; G.S. 1894 s. 6028; 1903 c. 15; R.L. 1905 s. 4457; G.S. 1913 s. 8107; G.S. 1923 s. 9602; M.S. 1927 s. 9602.

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**1. Foreclosure generally**

The possession of mortgaged premises by either the mortgagor or mortgagee in no way affects the right of the one to redeem, or the other to foreclose. *Parsons v Noggle*, 23 M 328.

The term "foreclosure" is sometimes used to denote the entire process of barring the equity of redemption, including the expiration of the redemption period. *Standish v Vasberg*, 27 M 175, 6 NW 489.

Sometimes the term "foreclosure" is used to denote the sale and attendant proceedings. *Beal v White*, 28 M 6, 8 NW 829; *Duncan v Cobb*, 32 M 460, 21 NW 714; *Larocque v Chapel*, 63 M 517, 65 NW 941.

*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.* *Sprague v Martin*, 29 M 226, 13 NW 34.

A covenant of warranty in a deed of conveyance, and a covenant against encumbrances, excepting mortgages to a certain amount, estops the grantor from afterwards acquiring and enforcing the mortgage lien against the premises conveyed, but a conveyance by a subsequent grantee, subject to mortgages duly recorded, operates as an estoppel against the former estoppel, and sets the matter at large, and the mortgage becomes enforceable in the hands of the original grantor or his assignee, and the mortgage having provided for foreclosure by advertisement, the character of the remedy is not changed from foreclosure by advertisement to an action in equity. *Tappan v Huntington*, 97 M 31, 106 NW 98.

The agreement made during the pending of the foreclosure proceedings does not purport to effect a dismissal of the foreclosure procedure. The foreclosure appears to have been regularly had and the sale fairly conducted. *Truman National v Lovell*, 166 M 33, 206 NW 944.

Where without fraud a bankrupt failed to schedule as an asset an interest in real estate and he is discharged without the property being disposed of by the trustee, the title which the latter took by operation of law under the bankruptcy

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act reverts to the owner subject to reopening of the bankruptcy proceedings. *Stipe v Jefferson*, 192 M 504, 257 NW 99.

A court of equity has broad powers to mold its decree to fit the case, and in the instant case, the court properly set aside the foreclosure, provided the mortgagor executed renewal notes and renewal mortgage in accordance with a previous mutual agreement. *Young v Penn Mutual*, 193 M 578, 259 NW 405.

The common law effect has been cut down until now, while in form a conveyance, a mortgage creates a mere lien or security. The power of sale is part of the security. *Hatlestad v Mutual Trust*, 197 M 640, 268 NW 665.

An oral contract on the one hand to make and on the other to accept a mortgage on real estate is unenforceable under the statute of conveyances and of frauds. *Hatlestad v Mutual Trust*, 197 M 640, 268 NW 665.

The foreclosure by advertisement of a real estate mortgage is not void because neither mortgagee nor his attorney, with power to conduct the foreclosure, is personally present. The attorney may delegate to another, a layman, the duty of submitting a bid to the sheriff on behalf of the mortgagee who purchased at the sale. *Klotz v Jeddelloh*, 201 M 355, 276 NW 244.

Payments made on first mortgage by mortgagor after giving a second mortgage as tolling the statute of limitations between the first and second mortgages. 9 MLR 167.

## 2. Two methods

A mortgage containing no power of sale can be foreclosed only by action. *King v Meighen*, 20 M 264 (237).

There are only two methods by which a mortgage may be foreclosed: by action and by advertisement. *Archambeau v Green*, 21 M 520.

A release by the mortgagor to the mortgagee of the equity of redemption after condition broken is tantamount to foreclosure. *Sprague v Martin*, 29 M 226, 13 NW 34.

The common law method of foreclosure by entry and possession existing in some states is only another mode of enforcing the security, and does not obtain in this state. *Sprague v Martin*, 29 M 229, 13 NW 34.

The two allowable remedies in this state, by action or under power, are cumulative. *Foster v Johnson*, 39 M 378, 40 NW 255.

In foreclosure by advertisement (under a power), 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 foreclosure by action, the title passes by virtue of the decree and sale under it, and there is no going behind the decree to ascertain if the mortgage was sufficient to operate as a conveyance, the two remedies are cumulative. *Foster v Johnson*, 39 M 378, 40 NW 255.

## 3. General nature of foreclosure by advertisement

Foreclosure by advertisement is in the nature of an ex parte proceeding. *Heath v Hall*, 7 M 315 (243).

In foreclosure by advertisement the proceedings are in pais and in rem. *Morrison v Mendenhall*, 18 M 232 (212); *Loy v Home Insurance Co.* 24 M 315; *Jordan v Humphrey*, 31 M 495, 18 NW 450; *Kirkpatrick v Lewis*, 46 M 164, 47 NW 970; *In re Grundysen*, 53 M 346, 55 NW 557; *Lundberg v Davidson*, 72 M 49, 74 NW 1018; *Swain v Lynd*, 74 M 72, 76 NW 958.

The advantages of foreclosure by advertisement over foreclosure by action are: It is expeditious. *Morrison v Mendenhall*, 18 M 232 (212);

That it is simple and inexpensive. *Clifford v Tomlinson*, 62 M 195, 64 NW 381; and

It avoids the necessity of bringing in as parties all persons in interest, and avoids the danger of a failure to secure a perfect title by reason of a defect of parties defendant. *Lundberg v Davidson*, 72 M 49, 74 NW 1018.

Foreclosure by advertisement is controlled by the statute irrespective of the terms of the mortgage. *Butterfield v Farnham*, 19 M 85 (58); *Webb v Lewis*, 45 M 285, 47 NW 803.

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 on the party in possession takes the place of service by process by which an action to foreclose is commenced. *Fowler v Woodward*, 26 M 347, 4 NW 231.

The proceedings while in pais are analogous to a judicial proceeding. *Webb v Lewis*, 45 M 285, 47 NW 803.

It is not a special proceeding within the meaning of General Statutes 1878, Chapter 88, Section 9 (section 481.08). In re *Grundysen*, 53 M 346, 55 NW 557.

The proceeding is in derogation of the common law. *Clifford v Tomlinson*, 62 M 195, 64 NW 381.

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. *Swain v Lynd*, 74 M 72, 76 NW 958; *Cutting v Patterson*, 82 M 375, 85 NW 172.

A mortgage containing no power of sale cannot be foreclosed by advertisement. *Purcell v Thornton*, 128 M 255, 150 NW 899.

#### 4. The power

Payment of the mortgage extinguishes the power. *Misener v Gould*, 11 M 166 (105).

The statute is superior to the power. Where a mortgagee, foreclosing under a power, complies with the requirements of the statute, it is sufficient, although there may be additional requirements contained in the mortgage. *Butterfield v Farnham*, 19 M 85 (58).

If there is no power the only way that the mortgage can be foreclosed is by action. *King v Meighen*, 20 M 264 (237).

The power of sale is a part of the mortgage and passes by an assignment of the mortgage without special mention. *Brown v Delaney*, 22 M 349; *Dunning v McDonald*, 54 M 1, 55 NW 864.

The power is not exhausted by an abortive sale. *Bottineau v Aetna Life*, 31 M 125, 16 NW 849; *Cobb v Bord*, 40 M 479, 42 NW 396.

The transfer of a portion of the mortgage debt will not carry with it a corresponding portion of the power. *Solberg v Wright*, 33 M 224, 22 NW 381.

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 execution of the power. A party may grant a valid power of this kind in the absence of any statute either authorizing its creation or regulating its exercise. *Webb v Lewis*, 45 M 285, 47 NW 803.

The statute may have requirements in addition to those in the mortgage. *Webb v Lewis*, 45 M 285, 47 NW 803.

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. *Backus v Burke*, 48 M 260, 51 NW 284.

The power of sale cannot be severed from the legal ownership of the mortgages. *Dunning v McDonald*, 54 M 1, 55 NW 864; *Merrick v Putnam*, 73 M 240, 75 NW 1047.

The evidence is conclusive that defendant had no contract under which the money deposited in defendant's bank could be appropriated to the payment of unpaid taxes after defendant bid in the mortgaged premises for the full amount of the debt. *Business Holding Co. v Farmers & Mechanics*, 194 M 171, 259 NW 812.

#### 5. Death, insanity or disability of mortgagor

The right to foreclose is not affected by the death of the mortgagor. *Jones v Tainter*, 15 M 512 (423); *Fleming v McCutcheon*, 85 M 152, 88 NW 433;

Nor by the insanity or disability of the mortgagor. *Lundberg v Davidson*, 68 M 328, 71 NW 395, 72 NW 71; 72 M 49, 74 NW 1018.

**6. Strict compliance with statute required**

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. *Dana v Farrington*, 4 M 433 (335); *Spencer v Annon*, 4 M 542 (426); *Heath v Hall*, 7 M 315 (243); *Holmes v Crummett*, 30 M 23, 13 NW 924; *Martin v Baldwin*, 30 M 537, 16 NW 449; *Mason v Goodnow*, 41 M 9, 42 NW 452; *Richards v Finnegan*, 45 M 208, 47 NW 788; *Backus v Burke*, 48 M 260, 51 NW 284; *Clifford v Tomlinson*, 62 M 195, 64 NW 381; *Homel v Corbin*, 69 M 23, 72 NW 106; *Cutting v Patterson*, 82 M 375, 85 NW 172.

In case of irregularity, it is necessary for the party seeking relief to show actual prejudice. *Heath v Hall*, 7 M 315 (243); *Peaslee v Ridgway*, 82 M 288, 84 NW 1024.

The party seeking relief cannot have it because of non-compliance with a requirement not designed for his protection. *Holmes v Crummett*, 30 M 23, 13 NW 924.

A void sale or attempt to sell under a power does not prevent the mortgagee proceeding again to foreclose under the same power, and mere irregularities are not fatal unless they operate to prejudice some party interested. *Bottineau v Aetna Life*, 31 M 125, 16 NW 849.

The notice of sale required to be served on the person in actual possession of the mortgaged premises is designed for the protection of all parties having an interest in the premises, and not for the exclusive benefit of the occupant himself; hence the omission to serve such notice may be raised, for the purpose of invalidating the foreclosure by anyone having an interest in the premises derived from or through the mortgagor. *Swain v Lynd*, 74 M 72, 76 NW 958.

**7. Sufficient compliance**

If a foreclosure complies with the requirements of the statute, it is sufficient although there may be additional requirements contained in the mortgage. *Butterfield v Farnham*, 19 M 85 (58).

**8. What law governs; impairment of contract**

Upon foreclosure under the power in a mortgage executed prior to the act of March 10, 1860, there is only one year in which to redeem. In the act of July 29, 1858, which gives one year to redeem, the clause "or such other time as may be prescribed by law" as applies to a mortgage executed while that act was in force does not authorize an act changing the time to redeem as it would impair the obligation of contracts. *Goenen v Schroeder*, 8 M 387 (345); *Wilson v McCormick*, 10 M 216 (174); *Hillebert v Porter*, 28 M 496, 11 NW 84.

The law in force at the time of a foreclosure governs as to notice. *Atkinson v Duffy*, 16 M 45 (30).

Law in force at the time of foreclosure governs as to the statute of limitations. *Archanbeau v Green*, 21 M 520; *Duncan v Cobb*, 32 M 460, 21 NW 714.

Law in force at the time of execution of the mortgage governs as to the right to redeem. *Willis v Jelineck*, 27 M 18, 6 NW 373; *O'Brien v Krenz*, 36 M 136, 30 NW 458; *Lowry v Mayo*, 41 M 388, 43 NW 78.

The amount required to redeem, and the rights of the parties in the property arising from the sale, are governed by the law in force at the time of the execution of the mortgage. (This modifies and to some extent overrules the following cases: *Stone v Bassett*, 4 M 298 (215); *Heyward v Judd*, 4 M 483 (375); *Freeborn v Pettibone*, 5 M 577 (219); *Turrell v Morgan*, 7 M 368 (290); *Berthold v Holman*, 12 M 335 (221); *Berthold v Fox*, 13 M 501 (462)). General Statutes 1878, Chapter 81, Section 13, so far as it applies to mortgages with powers executed prior to its passage, and requires to be paid for redemption from sales under the powers in such mortgages, a greater rate of interest than that required to be paid on such redemption by the laws in force at the time of executing such mortgages impairs their obligation and is void. *Hillebert v Porter*, 28 M 496, 11 NW 84.

The right to foreclose is governed by the law in force on the date of execution of the mortgage. *O'Brien v Krenz*, 36 M 136, 40 NW 458.

The statute defining the force of the certificate as evidence, being a mere rule of evidence, is governed by the law in force at the time of foreclosure. *Burke v Lacock*, 41 M 250, 42 NW 1016.

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 foreclosure. Their substantive rights arising from an exercise of the power are governed by the law in force at the time of execution of the mortgage. *Stahl v Mitchell*, 41 M 325, 43 NW 385; *Webb v Lewis*, 45 M 285, 47 NW 803.

The statute regulating the recording of the certificate of sale is governed by laws in force at the time of foreclosure. *Ryder v Hulett*, 44 M 353, 46 NW 559.

The statute defining who shall conduct the sale is governed by laws in force at the time of the foreclosure. *Webb v Lewis*, 45 M 285, 47 NW 803.

### 9. Statute of limitations

Laws 1870, Chapter 60, which requires every action to foreclose a mortgage upon real estate to be commenced within ten years after the cause of action accrues has no application to foreclosure by advertisement. *Golcher v Brisbin*, 20 M 453 (407).

Under Laws 1871, Chapter 52, the limitation was ten years. *Archambeau v Green*, 21 M 520; *Benton v Nicoll*, 24 M 221; *Fisk v Stewart*, 26 M 365, 4 NW 611; *Duncan v Cobb*, 32 M 460, 21 NW 714; *Cobb v Bord*, 40 M 479; 42 NW 396; *Banning v Sabin*, 45 M 431, 48 NW 8.

Entering into possession after the mortgage has become barred does not revive the mortgage. *Benton v Nicoll*, 24 M 221; *Banning v Sabin*, 45 M 431, 48 NW 8.

It is not enough to commence the proceedings within the time limited; they must be completed. *Duncan v Cobb*, 32 M 460, 21 NW 714.

Prior to the enactment of Laws 1903, Chapter 15, it was an open question whether a partial payment on the debt would extend the time in which to redeem. *Kenaston v Lorig*, 81 M 464, 84 NW 323.

### 10. Effect 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. *Berthold v Holman*, 12 M 335 (221); *Tinkcom v Lewis*, 21 M 132; *Martin v Fridley*, 23 M 13; *Sprague v Martin*, 29 M 226, 13 NW 34; *Sergeant v Ruble*, 33 M 354, 23 NW 535; *Pioneer Savings v Farnham*, 50 M 315, 52 NW 897; *American Building v Waleen*, 52 M 23, 53 NW 867; *Boutelle v Minneapolis*, 59 M 493, 61 NW 554; *Evans v Rhode Island Hospital*, 67 M 160, 69 NW 715, 1069.

By foreclosure sale alone, under a real estate mortgage, the mortgagor is not deprived of his right of redemption. It continues for a year after sale. The measure of the mortgagor's damage for a premature foreclosure (which could have been prevented or set aside had he so elected) is not the value of the property in excess of the debt, but only the value of the use to the extent that the mortgagor has been deprived thereof by the wrong done. *Bowen v Bankers Life*, 185 M 35, 239 NW 774.

A trust deed securing a series of bonds was foreclosed by action, resulting in the property being sold for sufficient to cover principal, interest and costs. The grantor's debt was thereby fully paid, and the bonds became merely evidence of the bondholder's share of the redemption money or property. Where the original obligor after the sale came into ownership of some of the bonds, his rights were identical with other holders. *Olmstead Bank v Pesch*, 218 M 424, 16 NW(2d) 470.

### 11. Effect on lien

If the owner or his assign annuls the sale for a first instalment by redeeming, a second sale may be had for another instalment. *Daniels v Smith*, 4 M 172 (117);

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Standish v Vosberg, 27 M 175, 6 NW 489; Herber v Christopherson, 30 M 395, 15 NW 676.

It is the general rule that a single valid sale exhausts the lien of the mortgage, or in other words, there can be but one valid sale of the same land under the same power. Paquin v Braley, 10 M 379 (304); Dick v Moon, 26 M 309, 4 NW 39; Hanson v Dunton, 35 M 189, 28 NW 221; Loomis v Clambey, 69 M 469, 72 NW 707.

Under General Statutes 1866, Chapter 81, Section 3, the rule differed from our present rule as defined in Fowler v Johnson, 26 M 338, 3 NW 986, 6 NW 486, and later cases. Under the 1866 statute, where the land was sold on foreclosure of an instalment, it was held that one who redeemed from that foreclosure took the property subject to the lien of the instalments not due, and on which the mortgagee had the right to foreclose. Watkins v Hackett, 20 M 106 (92); Taylor v Burgess, 26 M 547, 6 NW 350.

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. This holding is based on General Statutes 1866, Chapter 81, Section 4, a new section added with the enactment of the 1866 code; and changes the law on which Watkins v Hackett, 20 M 106 (92), was decided. Fowler v Johnson, 26 M 338, 3 NW 986, 6 NW 486; Standish v Vosberg, 27 M 175, 6 NW 489; Martin v Sprague, 29 M 53, 11 NW 143; Loomis v Clambey, 69 M 469, 72 NW 707; Darelus v Davis, 74 M 345, 77 NW 214.

The rules set out in this clause 11, are inapplicable to an invalid or incomplete sale. Standish v Vosberg, 27 M 315, 6 NW 489; Lindgren v Lindgren, 73 M 90, 75 NW 1034.

The remedy on the mortgage as 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. Pioneer Savings v Farnham, 50 M 315, 52 NW 897.

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. Loomis v Clambey, 69 M 469, 72 NW 707.

After foreclosure sale, the rights of the parties are determined exclusively by the statute, the remedy on the mortgage as security being exhausted by the foreclosure. Although the mortgage expressly assigned rents to pay taxes, the right so given was terminated by the sale. The purchaser is not entitled to rents accruing during the period allowed for redemption to pay taxes subject to which he bid in the property. Gardner v Prindle, 185 M 147, 240 NW 351; Fredin v Cascade Realty, 205 M 256, 285 NW 615.

Where the plaintiff held a mortgage to secure the principal and interest of defendant's indebtedness to it and an assignment of rents given to secure an extension of time on past due interest and that to become due during the extension, and where the price bid at a subsequent foreclosure was less than the full amount including principal and interest, such price is to be applied by equity, first upon the indebtedness for which the creditor held but a single security, leaving the interest secured by the assignment or a still existing debt secured by the assignment. Prudential v Enkema, 196 M 154, 264 NW 576.

Effect of foreclosure upon subsequent lease or lessee. 21 MLR 610.

## 12. Specific mortgage 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. Farnsworth v Commonwealth Title, 87 M 179, 91 NW 469.

## 13. Emergency orders

The existence of the economic emergency, justified the legislature in the exercise of the police power of the state to enact law to relieve from the emergency.

The law goes no farther than reasonably necessary in granting relief under the existing conditions. *Blaisdell v Home Building & Loan*, 189 M 422, 249 NW 334; 290 US 398.

Laws 1935, Chapter 47, the mortgage moratorium law, construed as having enlarged the equity powers relating to redemption of a mortgage on real estate. In case of a foreclosure by action in federal court, relief under the statute cannot be had in the state courts. *Weisman v Massachusetts Life*, 196 M 574, 265 NW 431.

Statutory provision prohibiting institution or maintenance of foreclosure proceedings after mortgagor's filing of petition for agricultural composition or extension does not extend or toll the period of redemption where mortgagors filed petition more than four months after foreclosure sale and no further steps were required of mortgagee to obtain title. *In re Klein*, 9 F. Supp. 57.

Under the governor's execution order, the mortgagor could not consent to a foreclosure of a mortgage. OAG Mar. 27, 1933.

**580.02 REQUISITES FOR FORECLOSURE.**

**HISTORY.** 1878 c. 53 s. 2; G.S. 1878 c. 81 s. 2; G.S. 1894 s. 6029; 1903 c. 87 s. 1; 1905 c. 136; R.L. 1905 s. 4458; G.S. 1913 s. 8108; G.S. 1923 s. 9603; M.S. 1927 s. 9603.

1. **Default**
2. **No action or proceeding**
3. **Only record owner may foreclose**
4. **Stranger to mortgage**
5. **Personal representative**
6. **Equitable owner**
7. **Assignee**
8. **Sufficiency of record**

**1. Default**

Publication prematurely made and consequently no valid foreclosure. *Pratt v Tinkcom*, 21 M 142.

There is no right to foreclose under a power until it has become operative by reason of some default. *Jones v Ewing*, 22 M 157.

At the time of the foreclosure of the Felton mortgage, the right of subrogation had not as yet ripened in Bissel, and the foreclosure was therefore void. *Felton v Bissel*, 25 M 15.

Where a mortgage provides that on default in the payment of interest, the mortgagee may declare the whole sum due, the election may be exercised by advertising a sale without other notice of the election. *Fowler v Woodward*, 26 M 347, 4 NW 231.

On foreclosure, the land was sold in blocks, and where the action to set aside the sale because the land had not been sold by lots, was delayed until after time for redemption had expired, a demurrer to the complaint was properly sustained. *Abbott v Peck*, 35 M 499, 29 NW 194.

In an action to restrain a foreclosure prior to its maturity for alleged default in carrying insurance and other items, the facts being at issue, the court properly, in its discretion, temporarily restrained the foreclosure sale, unless the issues could be judicially determined. *O'Brien v Oswald*, 45 M 59, 47 NW 316.

The attorney who drew the notice and printer who set the type must be paid by the mortgagor, even though there was no actual publication or service of the notice. *Mjones v Yellow Medicine Bank*, 45 M 335, 47 NW 1072.

The collection of interest at illegal rates upon default in its payment cannot be enforced by foreclosure of a mortgage given to secure the performance of the contract. *Chase v Whitten*, 51 M 485, 53 NW 767.

In an action to set aside a foreclosure, the trial court found for the plaintiff, holding the mortgagor was not in default. This was reversed on appeal, mortgage being clearly in default. *Hebert v Turgeon*, 84 M 34, 86 NW 757.

The findings that the interest in dispute had been paid to decedent's agent, and there being no default at the time of the foreclosure, the trial court properly set aside the foreclosure. *Scott v Nordin*, 171 M 469, 214 NW 472.

Mortgagor paid \$1,500 to an alleged agent of the mortgagee, said by the mortgagee to have been verbally discharged by him. The court properly enjoined the mortgagee from proceeding with the foreclosure for more than \$800.00 and interest. *Granberg v Pitz*, 195 M 137, 262 NW 166.

### 2. No action or proceeding

Where judgment has been recovered for the mortgage debt, the mortgage may be foreclosed by advertisement, if the execution "was in fact and in law returned wholly unsatisfied." *Ross v Worthington*, 11 M 438 (323).

Mortgagor gave the mortgagee a note in payment of interest past due. The note not being paid was reduced to judgment. These facts do not estop the mortgagee from making a valid foreclosure. *Goenen v Schroeder*, 18 M 66 (51).

In setting up title acquired at a sale under a statutory foreclosure of a real estate mortgage, the pleading need not contain an averment that in the foreclosure "no action or proceeding has been instituted at law to recover the debt secured by the mortgage, or any part thereof," because this is negative matter, and more properly comes in defense. *Jones v Ewing*, 22 M 157.

The pendency of an action in any state to recover the debt secured by the mortgage suspends the right to foreclose by advertisement, and the pendency of the action during part of the time the notice of sale is being published, even though dismissed, vitiates the foreclosure. *Aldinger v Close*, 161 M 404, 201 NW 625.

An alleged agreement that the mortgagor might, if there was no redemption, repurchase the property on terms agreed upon, did not abandon the foreclosure or extend the mortgage or waive any right acquired by the foreclosure. Investors Syndicate v Horrigan, 186 M 599, 244 NW 65.

Plaintiffs' suit for an accounting against their loan agent and this defendant, was not an action pending which precluded defendant from foreclosing its mortgage by advertisement. *Morris v Penn Mutual*, 196 M 403, 265 NW 278.

Double hazard of a note and mortgage. 16 MLR 134.

### 3. Only record owner may foreclose

The statute has reference only to such assignments as are made by contract; and where mortgagee had deceased, and the notice of sale was signed by "Silas H. Baldwin, administrator of R. A. Baldwin, mortgagee, deceased", the notice was sufficient. *Baldwin v Allison*, 4 M 25 (11).

Only the legal and record owner of the mortgage and power can give the notice and foreclose by advertisement. *Bowles v Carli*, 12 M 113 (62); *Brown v Delaney*, 22 M 349; *Felton v Bissel*, 25 M 15; *Dick v Moon*, 26 M 309, 4 NW 39; *Bottineau v Aetna Life*, 31 M 125, 16 NW 849; *Solberg v Wright*, 33 M 224, 22 NW 381; *Benson v Markoe*, 41 M 112, 42 NW 787; *Lowry v Mayo*, 41 M 388, 43 NW 78; *Carpenter v Artisans' Savings Bank*, 44 M 521, 47 NW 150; *Backus v Burke*, 48 M 260, 51 NW 284; *Burke v Backus*, 51 M 174, 53 NW 458; *Dunning v McDonald*, 54 M 1, 55 NW 864; *Hathorn v Butler*, 73 M 15, 75 NW 743; *Merrick v Putnam*, 73 M 240, 75 NW 1047; *Clark v Mitchell*, 81 M 438, 84 NW 327; *Northern Cattle v Munro*, 83 M 37, 85 NW 919; *Simonton v Connecticut Mutual*, 90 M 24, 95 NW 451; *Huitink v Thompson*, 95 M 392, 104 NW 237.

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. *Morrison v Mendenhall*, 18 M 232 (212); *Thorwarth v Armstrong*, 20 M 464 (419); *Thorpe v Merrill*, 21 M 336; *Benson v Markoe*, 41 M 112, 42 NW 787; *Backus v Burke*, 48 M 260, 51 NW 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



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has the legal title to the instrument. *Brown v Delaney*, 22 M 349; *Bottineau v Aetna Life*, 31 M 125, 16 NW 849; *Solberg v Wright*, 33 M 224, 22 NW 381; *Burke v Backus*, 51 M 174, 53 NW 458; *Northern Cattle v Munro*, 83 M 37, 85 NW 919.

If the record owner loses his interest in the mortgage during the course of the publication of the notice, he cannot complete the foreclosure. *Dunning v McDonald*, 54 M 1, 55 NW 864; *Merrick v Putnam*, 73 M 240, 75 NW 1047.

Whether, the publication being regular, a change in the record ownership of the mortgage between the last publication and the date of sale will affect the regularity of the sale, is an open question. *Dunning v McDonald*, 54 M 1, 55 NW 864.

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. *Dunning v McDonald*, 54 M 1, 55 NW 864.

An assignment of a real estate mortgage is a conveyance within the meaning of the statutes requiring instruments affecting title to real estate to be recorded, and void as to third persons without notice, if not recorded; and in the instant case where the assignee of a mortgage failed to record his assignment, a foreclosure by a mortgagee was upheld as against innocent purchasers. *Huitink v Thompson*, 95 M 392, 104 NW 237.

Defendant, a foreign corporation, took a real estate mortgage while duly licensed to do business in this state; it foreclosed the mortgage by advertisement after its license had expired. The foreclosure was valid. *Morris v Penn Mutual*, 196 M 403, 265 NW 278.

Covenants of title in mortgages. 12 MLR 56.

### 4. Stranger to mortgage

The attempt of a stranger to the mortgagee to foreclose a mortgage is a nullity. A mortgagee being dead, a foreclosure by advertisement upon a notice of sale purporting to be given by authority of the mortgagee, is void. *Bausman v Kelley*, 38 M 197, 36 NW 333.

Only the mortgagee, his agent, attorney, executor, administrator, or assignee, can exercise the power of sale. *Simonton v Connecticut Mutual*, 90 M 24, 95 NW 451.

### 5. Personal representative

A domestic executor or administrator may foreclose a mortgage without recording his appointment. *Baldwin v Allison*, 4 M 25 (11); *Holcombe v Richards*, 38 M 38, 35 NW 714.

The statute provides that a foreign executor or administrator may foreclose a mortgage in this state. This statute is a regulation, and not a grant of power. *Holcombe v Richards*, 38 M 38, 35 NW 714; *Cone v Nimocks*, 78 M 249, 80 NW 1056.

An assignee of a foreign executor may foreclose without recording the appointment of his assignor. *Cone v Nimocks*, 78 M 249, 80 NW 1056.

In the instant case an administrator held authorized to foreclose a mortgage which he himself held against the mortgagor of whose estate he was administrator. *Fleming v McCutcheon*, 85 M 152, 88 NW 433.

### 6. Equitable owner

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 the sale so as to protect equitable interests. *Brown v Delaney*, 22 M 349; *Dick v Moon*, 26 M 309, 4 NW 39; *Bottineau v Aetna Life*, 31 M 125, 16 NW 849; *Solberg v Wright*, 33 M 224, 22 NW 381; *Burke v Backus*, 51 M 174, 53 NW 458; *Clark v Mitchell*, 81 M 438, 84 NW 327; *Northern Cattle Co. v Munro*, 83 M 37, 85 NW 919.

Where several notes maturing at different times secured by one mortgage are assigned to different parties at different times, and the proceeds of the mortgaged

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property are insufficient to pay all in full, such proceeds should, in the absence of any contract for a different order, be applied pro rata towards the payment of all the notes. *Wilson v Eigenbrodt*, 30 M 4, 13 NW 907.

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. *Bottineau v Aetna Life*, 31 M 125, 16 NW 849; *Bausman v Fane*, 45 M 412, 48 NW 13.

Foreclosure proceedings by advertisement are based wholly upon record ownership, and mere equitable interests cannot be recognized or given effect therein. There is no such thing as foreclosure by advertisement of an equitable mortgage. *Benson v Markoe*, 41 M 112, 42 NW 787; *Backus v Burke*, 48 M 260, 51 NW 284; *Burke v Backus*, 51 M 174, 53 NW 458; *Dunning v McDonald*, 54 M 1, 55 NW 864; *Clark v Mitchell*, 81 M 438, 84 NW 327.

A chattel mortgage to "A" as mortgagee had not been formally assigned by him to the creditor holding the debt it was given to secure, and the latter foreclosed, affixing the name of "A" to the notice of sale. The foreclosure was held valid. *Carpenter v Artisans' Savings Bank*, 44 M 521, 47 NW 150.

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. *Bausman v Fane*, 45 M 412, 48 NW 13.

The trustee in foreclosing a certain mortgage did not include unpaid interest coupons. This is an action to establish a trust in favor of plaintiff, the owner of the unpaid coupons. Held, in an action to enforce an equitable interest in the property bought at foreclosure sale in the proportion that the amount due on the coupon bore to the entire amount of the mortgage, the complaint did not state a cause of action. *State Finance v Commonwealth*, 69 M 219, 72 NW 68.

### 7. Assignee

Assignments by operation of law need not be recorded. Thus an executor or administrator may foreclose a mortgage without recording his appointment. *Baldwin v Allison*, 4 M 25 (11); *Holcombe v Richards*, 38 M 38, 35 NW 714.

The power of sale resting on the mortgage and being contained therein, an assignee cannot exercise the power unless all assignments are recorded. *Bowles v Carli*, 12 M 113 (62); *Morrison v Mendenhall*, 18 M 232 (212); *Lowry v Mayo*, 41 M 388, 43 NW 78; *Burke v Backus*, 51 M 174, 53 NW 458; *Dunning v McDonald*, 54 M 1, 55 NW 864; *Hathorn v Butler*, 73 M 15, 75 NW 743; *Merrick v Putnam*, 73 M 240, 75 NW 1047; *Casserly v Morrow*, 101 M 16, 111 NW 654.

Where an assignment is made by an agent, his authority need not be recorded. *Morrison v Mendenhall*, 18 M 232 (212).

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. *Brown v Delaney*, 22 M 349; *Dunning v McDonald*, 54 M 1, 55 NW 864.

Where the 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. *Bottineau v Aetna Life*, 31 M 125, 16 NW 849.

What constitutes an assignment by operation of law defined. *Burke v Backus*, 51 M 174, 53 NW 458.

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 and record a written reassignment. *Burke v Backus*, 51 M 174, 53 NW 458.

Instrument purporting to be an 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. *Casserly v Morrow*, 101 M 16, 111 NW 654.

**8. Sufficiency of record**

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 legalizd. *Ross v Worthington*, 11 M 438 (323).

Where an assignment was endorsed on a mortgage describing it as "the within described mortgage," and was thereafter recorded on a subsequent page of the same book as the mortgage, it was held a sufficient record to authorize a foreclosure. *Carli v Taylor*, 15 M 171 (131).

A mortgage on lands in two counties, but recorded in only one, may be foreclosed under the power as to lands in that county. *Balme v Wambaugh*, 16 M 116 (106); *VanMeter v Knight*, 32 M 205, 20 NW 142.

A false and impossible particular to the description of the premises by mistake of the register will not prevent a valid foreclosure. *Thorworth v Armstrong*, 20 M 464 (419).

A false and misleading description is fatal. *Thorpe v Merrill*, 21 M 336.

A mortgage with only one witness will not authorize a foreclosure; though recorded. *Johnson v Sandhoff*, 30 M 197, 14 NW 889.

A mortgage covered land in part in the county of McLeod and part in the county of Renville. The mortgage was duly recorded in full in Renville, but in recording it in McLeod, the description of the land situated in Renville was omitted from the record. In order to foreclose in one county premises situated in two counties, the mortgage must be recorded in both. *VanMeter v Knight*, 32 M 205, 20 NW 142.

If an assignment has not been properly acknowledged so as to entitle it to record a foreclosure by the assignee is void. *Lowry v Mayo*, 41 M 388, 43 NW 78.

All assignments must be recorded. *Hathorn v Butler*, 73 M 15, 75 NW 743.

In the exercise of judicial discretion, it was not improper for the court, on application of the defendants, to strike out the deficiency clause in a judgment in a foreclosure action which was in effect a personal judgment against defendants for a debt not yet due. *Winne v Lohart*, 155 M 307, 193 NW 587.

Before an assignee of a real estate mortgage can foreclose by advertisement, his title to the mortgage must appear of record to the extent that evidence outside the record is not needed to put it beyond reasonable question. Applied to this case where the final decree of distribution was so lacking that extraneous evidence was required to show that title to the mortgage vested in a legatee. *Soufal v Griffith*, 159 M 252, 198 NW 807.

The foreclosure by advertisement is vitiated whenever there is a clear departure from essential requisites of the statute. *Hudson v Upper Michigan Co.* 165 M 172, 206 NW 44.

**580.03 NOTICE OF SALE; SERVICE ON OCCUPANT.**

**HISTORY.** 1878 c. 53 s. 5; G.S. 1878 c. 81 s. 5; G.S. 1894 s. 6032; 1897 c. 334 s. 1; R.L. 1905 s. 4459; G.S. 1913 s. 8111; G.S. 1923 s. 9604; M.S. 1927 s. 9604.

1. Publication
2. Service on occupant
3. No provision for service on mortgagor

**1. Publication**

A failure to publish in a newspaper in a proper county renders the sale void. *Lowell v North*, 4 M 32 (15).

A publication may be discontinued, provided no one is misled. *Dana v Farrington*, 4 M 433 (335); *Banning v Armstrong*, 7 M 46 (31).

By following the general rule of excluding the first day of a publication and including the last day, a notice first published on August third, and published including September 14th, would permit a sale on the 14th, that being the 43rd day from August third. *Worley v Naylor*, 6 M 192 (123).

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No harm is done by publishing more than six successive weeks. *Atkinson v Duffy*, 16 M 45 (30).

The day set for the sale may be a considerable time beyond the last day of publication. *Atkinson v Duffy*, 16 M 45 (30); *Goenen v Schroeder*, 18 M 66 (51).

An affidavit of publication may properly be made by the publisher. *Menard v Crowe*, 20 M 448 (402); *Kipp v Cook*, 46 M 535, 49 NW 257.

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. *Pratt v Tinkcom*, 21 M 142.

A religious newspaper publishing general as well as religious news, is a newspaper within General Statutes 1878, Chapter 81, Section 5 (section 580.03). *Hull v King*, 38 M 349, 37 NW 792.

Where a mortgage covers several separate tracts lying in different counties, it is unnecessary to publish the notice in more than one of them. *Paulle v Wallis*, 58 M 192, 59 NW 959.

Where the record shows that the first publication was made on August 6, and last on Sept. 10, and sale made on September 16, the publication was insufficient to meet statutory requirements. *White v Mazal*, 192 M 522, 257 NW 281.

Having obtained an ex parte order of postponement under the moratorium act, plaintiff did not appear at the hearing, and the court directed mortgagee to proceed with foreclosure sale on a certain date. Fifteen months later, the mortgagor brought suit to set aside foreclosure for lack of sufficient publication. The court's order stands as barrier to plaintiff's cause of action and cannot be attacked collaterally. *Tankel v Union Central Life*, 196 M 165, 264 NW 693.

Whenever a cause of action has been reduced to judgment and such judgment remains in full force and unreversed, the original cause of action is merged therein and gone forever. The original cause loses its identity and character and is changed and transformed into another cause of action, that is, the judgment. *Twenty Associates v First National*, 200 M 211, 273 NW 696.

## 2. Service on occupant

Failure to comply with the provisions of the statute as to service renders the sale void. *Heath v Hall*, 7 M 315 (243); *Morey v City of Duluth*, 69 M 5, 71 NW 694; *Hebert v Turgeon*, 84 M 34, 86 NW 757.

Where husband and wife are residing on land owned by him, he is the proper person on whom to serve the notice. *Coles v Yorks*, 28 M 464, 10 NW 775.

If the mortgagor is in actual occupation of part of the land, and a tenant of his of the rest, notice on the mortgagor alone is sufficient as far as the rights of the mortgagor are concerned. *Holmes v Crummett*, 30 M 23, 13 NW 924.

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. *Casey v McIntyre*, 45 M 526, 48 NW 402; *Swain v Lynd*, 74 M 72, 76 NW 958.

The mortgagee himself may serve the notice. *Kirkpatrick v Lewis*, 46 M 164, 47 NW 970, 48 NW 783.

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. *Maltby v Tantges*, 50 M 248, 52 NW 858; *Temple v Norris*, 53 M 286, 55 NW 133; *Brigham v Connecticut Mutual*, 74 M 33, 76 NW 952; 79 M 350, 82 NW 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. *Maltby v Tantges*, 50 M 248, 52 NW 858.

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A girl 14 years old is presumptively a person of suitable age and discretion. It is not necessary that the person be familiar with business transactions and legal proceedings. *Temple v Norris*, 53 M 286, 55 NW 133.

An occupant must be served though he be insane. *Lundberg v Davidson*, 72 M 49, 74 NW 1018.

It is not necessary that the person served should be a member of the family or household of the occupant. *Brigham v Connecticut Mutual*, 74 M 33, 76 NW 952; 79 M 350, 82 NW 668.

To require notice to be served upon a party, his occupation must be open and visible, but it is not necessary that he be living on the land. *Cutting v Patterson*, 82 M 375, 85 NW 172.

In a highway case service is to be made on the person having actual possession and control of the land, and not upon all those who may reside thereon. *Thompson v Town of Berlin*, 87 M 7, 91 NW 25.

Where premises consist of separate farms, each occupied by different persons, notice must be served on each. *Casserly v Morrow*, 101 M 16, 111 NW 654.

If the character of the occupancy was such as to require the service of notice upon one in possession, then notice was required, though the one in possession was in possession without authority or license. It is a question for the jury whether the character of the occupancy was such that a notice should have been served. *Fitger v Alger*, 130 M 520, 153 NW 997; *Pomroy v Beattie*, 139 M 132, 165 NW 960.

The presence within a building upon mortgaged premises with windows and doors closed and locked, of household goods, kitchen utensils and other chattels, though no person be actually residing therein, is evidence of actual possession sufficient to require service of notice of foreclosure. *St. Paul Club v First State Bank*, 148 M 430, 182 NW 514.

Where the husband is the owner of premises mortgaged to secure his debt, and the husband and wife reside thereon, there being no right or interest in the wife other than such as the law grants to her by reason of such relation, service of notice to her is unnecessary. *Lindblood v Warren*, 156 M 318, 194 NW 778; *Pinger v Atkinson*, 169 M 474, 211 NW 681.

Notice of the foreclosure sale was not served upon the occupant as required by statute, and the foreclosure was invalid. *Ledgerwood v Hanford*, 172 M 184, 214 NW 925.

Service on a tenant who held the entire farm under a lease was sufficient, and it was not necessary to serve upon those who owned and occasionally used a hunter's cabin on the premises. *Skartum v Koch*, 174 M 48, 218 NW 446.

The fact of service on the proper party is what controls. The return that service was had on "H. A. Salisbury" when in fact his name was "Hector A. Salvail" does not invalidate the service. In *Re Petition of Rhode Island Hospital*, 191 M 354, 254 NW 466.

The purchaser of land, having mortgaged it to secure payment of the balance of the purchase price, entered upon it and planted fruit trees. There was no dwelling upon the land, but across the street on another tract owned by the mortgagor, was a house in which laborers lived who at times worked on the land in question. There was not such actual occupancy thereof as to require notice of foreclosure proceedings to be given to "person in possession." *Moulton v Sidle*, 52 F 616.

There is nothing in the governor's emergency executive order that prohibits serving notice of foreclosure proceedings on the occupant. OAG Mar. 22, 1933.

Under Laws 1935, Chapter 278, in case of doubt, service of notice of expiration of period of redemption should be made on the person who may be held to be in possession. 1936 OAG 409, Sept. 23, 1935 (425b-4).

Length of notice on foreclosure of mortgages. 5 MLR 325.

Double hazard of note and mortgage. 16 MLR 134.

### 3. No provision for service on mortgagor

There is no provision for service on subsequent encumbrancers. *Bennett v Healey*, 6 M 240 (158).

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At present there is no rule or provision for service on the mortgagor. The rule was otherwise under General Statutes 1866, Chapter 81, Section 5, but that provision was repealed by Laws 1877, Chapter 121. *Jones v Tainter*, 15 M 512 (423); *Atkinson v Duffy*, 16 M 45 (30); *Cutting v Patterson*, 82 M 375, 85 NW 172.

The character and nature of occupancy requiring service. See *Fitger v Alger*, 130 M 520, 153 NW 997; *Pomroy v Beattie*, 139 M 132, 165 NW 960.

Building closed and locked but with usual household equipment deemed one of actual occupancy. *St. Paul Club v First State Bank*, 148 M 430, 182 NW 514.

### 580.04 REQUISITES OF NOTICE.

**HISTORY.** 1878 c. 53 s. 6; G.S. 1878 c. 81 s. 6; 1883 c. 24 s. 1; G.S. 1894 s. 6033; 1903 c. 87; 1905 c. 136; R.L. 1905 s. 4460; G.S. 1913 s. 8112; G.S. 1923 s. 9605; M.S. 1927 s. 9605.

1. **By whom signed; names of parties**
2. **Date of the mortgage and notice**
3. **When and where mortgage recorded**
4. **The amount claimed to be due**
5. **Taxes paid**
6. **Description of premises**
7. **Time of sale**
8. **Place of sale**
9. **No action or proceeding**
10. **Manner of sale**
11. **Alteration**

#### 1. By whom signed; names of parties

A notice signed "Silas H. Baldwin, administrator of the estate of Rachel A. Baldwin, the said mortgagee, deceased" is sufficient. *Baldwin v Allison*, 4 M 25 (11); *Menard v Crowe*, 20 M 448 (401).

A notice signed by the attorney of the legal owner of the mortgage is sufficient. *Martin v Baldwin*, 30 M 537, 16 NW 449.

The notice must appear to be given by a person of competent authority. *Bausman v Kelley*, 38 M 197, 36 NW 333; *Backus v Burke*, 48 M 260, 51 NW 284; *Dunning v McDonald*, 54 M 1, 55 NW 864; *Hathorn v Butler*, 73 M 15, 75 NW 743.

Notice by a mere stranger can affect nothing. 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 really was the act of another and undisclosed person, not even standing in a relation of priority with the person in whose name the notice was given. *Bausman v Kelley*, 38 M 197, 36 NW 333.

A notice in the name of a deceased person is void. *Bausman v Kelley*, 38 M 197, 36 NW 333; *Welch v Cooley*, 44 M 446, 46 NW 908; *Bausman v Fane*, 45 M 412, 48 NW 13; *Bausman v Edes*, 46 M 148, 48 NW 769.

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 parentheses the full name of such partners immediately after the firm name and was subscribed "Farnham & Lovejoy, mortgagees," was held sufficient. *Menage v Burke*, 43 M 211, 45 NW 155.

The notice must disclose the true state of the record. *Backus v Burke*, 48 M 260, 51 NW 284.

It must be signed by all the record owners of the mortgage. *Dunning v McDonald*, 54 M 1, 55 NW 864.

A mistake in using "mortgagee" for "mortgagor" is fatal. *Clifford v Tomlinson*, 62 M 195, 64 NW 381.

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. *Hathorn v Butler*, 73 M 15, 75 NW 743.

Even where mortgage is assigned by mortgagee and reassigned to him, the name of each assignee must be specified. *Moore v Carlson*, 112 M 433, 128 NW 578.

Sufficiency of notice in mortgage foreclosure. 2 MLR 157.

Double hazard of note and mortgage. 16 MLR 134.

### 2. Date of the mortgage and notice

The notice itself need not be dated. If it is dated, the amount claimed must correspond with such date, but when not dated, the time of the first publication is its date. *Ramsey v Merriam*, 6 M 168 (104).

The words "First publication August 22, 1879," printed at the head of the notice is sufficient dating. *Coles v Yorks*, 28 M 464, 10 NW 775.

The notice must state the date of the mortgage. *Clifford v Tomlinson*, 62 M 195, 64 NW 381.

### 3. When and where mortgage recorded

Where an assignment was endorsed 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, held to be sufficient recording of the assignee to foreclose under the power. *Carli v Taylor*, 15 M 171 (131).

The notice must state the date on which the mortgage was recorded. *Martin v Baldwin*, 20 M 537, 16 NW 449.

The notice must state the page of the record where it was recorded. *Peaslee v Ridgway*, 82 M 288, 84 NW 1024.

### 4. The amount claimed to be due

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. *Spencer v Annon*, 4 M 542 (426); *Ramsey v Merriam*, 6 M 168 (104); *Bennett v Healey*, 6 M 240 (158); *Butterfield v Farnham*, 19 M 85 (58); *Menard v Crowe*, 20 M 448 (420); *Seiler v Wilber*, 29 M 307, 13 NW 136; *Bowers v Hechtman*, 45 M 238, 47 NW 792; *Lane v Holmes*, 55 M 379, 57 NW 132.

When the notice is dated, the amount claimed must correspond with such date. When it is not dated, the date of first publication controls. *Ramsey v Merriam*, 6 M 168 (104).

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. *Menard v Crowe*, 20 M 448 (420).

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. *Dick v Moon*, 26 M 309, 4 NW 39.

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. *Fowler v Woodward*, 26 M 347, 4 NW 231; *Trafton v Cornell*, 62 M 442, 64 NW 1148.

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

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. *Mason v Goodnow*, 41 M 9, 42 NW 482; *Bitzer v Campbell*, 47 M 221, 49 NW 691; *Child v Morgan*, 51 M 116, 59 NW 1127.

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

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give the information. *Vawter v Crafts*, 41 M 9, 42 NW 483; *Barge v Klausman*, 42 M 281, 44 NW 69; *Hamel v Corbin*, 69 M 223, 72 NW 106.

Where a mortgage contained an agreement that the mortgagor might divide the land into lots, and on selling a lot obtain a release from the mortgage, the covenant runs with the land and inured to the benefit of any grantee of the mortgagor, and the right of release continued even when the mortgage became in default. *Vawter v Crafts*, 41 M 14, 42 NW 483.

In foreclosure by advertisement, the fact that the notice of sale claims more than is then due on the mortgage will not invalidate the sale, unless it appears that the claim is made for a fraudulent purpose, or is prejudicial. *Bowers v Hechtman*, 45 M 238, 47 NW 792.

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. *Gorham v National Life*, 62 M 327, 64 NW 906; *Trafton v Cornell*, 62 M 442, 64 NW 1148.

When a foreclosure is made for an instalment due, it is not necessary to state that it is for an instalment. *Trafton v Cornell*, 62 M 442, 64 NW 1148.

Where a mortgagor is in a position to waive an irregularity in foreclosure proceedings under a power of sale, and no one else being interested, and the mortgagor tendered a deed conveying perfect title to the mortgagee, the mortgagee cannot take advantage of the invalidity of the proceedings, repudiate the sale, and sue on the note. *Saxe v Rice*, 64 M 190, 66 NW 268.

Where on foreclosure a mortgage was foreclosed without including certain coupons, the holders of those unpaid coupons cannot, through equity, obtain their proportionate share of the proceeds of the sale. *State Finance v Commonwealth*, 69 M 219, 72 NW 68.

Where several tracts or parcels, upon each of which a distinct lien is applied, are embraced in a single mortgage instrument, it is optional with the owner of the security and upon default, to enforce his rights in one proceeding for each separate lien, or to include all liens in one foreclosure, but if there is only one foreclosure, there is only one fee. *Farnsworth v Commonwealth*, 87 M 179, 91 NW 469.

A substantial overstatement of the mortgage debt in a notice of sale is sufficient ground for temporarily enjoining the sale. *Ekeberg v Mackay*, 114 M 501, 131 NW 787.

The language stated in the opinion used to describe the amount due was sufficient. *Dalzell v Fahse*, 155 M 211, 193 NW 162.

The notice of foreclosure stated the amount due to be \$116.55 more than actually due. This error did not vitiate the foreclosure, nor the fact that defendant bid \$247.19 more than was due. Plaintiff was not harmed. This excess was applied on the counter-claim. *Morris v Penn Mutual*, 196 M 403, 265 NW 278.

### 5. Taxes paid

The notice need not specify the years for which the taxes were paid. *Jones v Cooper*, 8 M 334 (294).

As to taxes paid subsequent to the date of the notice, and prior to the date of 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." *Kirkpatrick v Lewis*, 46 M 164, 47 NW 970, 48 NW 783.

Where there is a blanket mortgage constituting a specific lien on several tracts, the notice should specify taxes paid on each tract separately. *Bitzer v Campbell*, 47 M 221, 49 NW 691.

The mortgagee having between the commencement of the foreclosure and the date of sale paid taxes on the property was entitled under the notice of sale to have paid to him out of the proceeds of the sale, the amount paid out as taxes. *Gorham v National Life*, 62 M 327, 64 NW 906.

In the instant case where the mortgagor sues to recover surplus bid at the sale over the amount due, the mortgagee cannot retain the amount paid out as taxes after the sale. *Wyatt v Quinby*, 65 M 537, 68 NW 109.



The notice should state the amount claimed for taxes paid prior to the notice. *Hamel v Corbin*, 69 M 223, 72 NW 106.

#### **6. Description of premises**

A description of the premises in the notice conforming substantially to the description in the mortgage is sufficient. *Johnson v Cocks*, 37 M 530, 35 NW 436; *Schoch v Birdsall*, 48 M 441, 51 NW 382; *Baumann v Granite Savings Bank*, 66 M 227, 68 NW 1074.

In the foreclosure of a mortgage by advertisement, the description of the property, consisting of consecutively numbered lots, through mistake was altered to omit several lots. The condition of the mortgagor was not charged, and rights of third parties not having intervened, the court properly vacated the foreclosure and directed a new foreclosure by action. *Romkey v Saumweber*, 170 M 438, 212 NW 816.

#### **7. Time of sale**

While it is not imperative, it is good practice to state the hour of sale. *Menard v Crowe*, 20 M 448 (402); *Thorwarth v Armstrong*, 20 M 464 (419).

The notice must state the time of sale. Where the time set was at the hour of 11 a. m., a sale at quarter to 11 is void. *Richards v Finnegan*, 45 M 208, 47 NW 788.

#### **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 being in the state of Minnesota. *Merrill v Nelson*, 18 M 366 (335);

"At the court-house in the city of St. Paul." *Golcher v Brisbin*, 20 M 453 (407);

"At the front door of the court-house in the city of St. Paul." *Thorwarth v Armstrong*, 20 M 464 (419);

"At the front door of the court-house in the city of Minneapolis, corner 2nd Ave. So. and 3rd St.," the sale being held in a building at such corner used temporarily as a court-house. *Johnson v Cocks*, 37 M 530, 35 NW 436.

A notice designating a place which does not exist is void. Calling a city a village is not fatal. *Bottineau v Aetna Life*, 31 M 125, 16 NW 849.

#### **9. No action or proceeding**

It is not necessary to state in the notice that no action or proceeding has been instituted to recover the mortgage debt. This is negative matter and may be raised in defense. *Jones v Ewing*, 22 M 157.

#### **10. Manner of sale**

It is sufficient to state that the mortgage will be foreclosed by a sale of the premises pursuant to statute. It is not necessary to state in what order the sale will be conducted or that it will be in particular parcels. *Pace v Chadderdon*, 35 M 499, 29 NW 194.

#### **11. Alteration**

A material alteration of the notice during the course of publication, such as changing date of sale, is fatal. *Dana v Farrington*, 4 M 433 (335).

#### **580.05 ATTORNEY TO FORECLOSE; RECORD OF POWER.**

HISTORY. 1897 c. 262; 1905 c. 67; R.L. 1905 s. 4461; G.S. 1913 s. 8119; G.S. 1923 s. 9606; M.S. 1927 s. 9606.

A power of attorney which substantially complies with the statute and describes the mortgage with reasonable certainty is sufficient. *Peaslee v Ridgway*, 82 M 288, 84 NW 1024; *First National v Coon*, 143 M 264, 173 NW 431.

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## MORTGAGE FORECLOSURE BY ADVERTISEMENT 580.06

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A mortgage may be foreclosed with or without the assistance of a lawyer, but so long as no attorney's fees are included as a charge against the mortgagor, and the mortgagee signs the notice of sale, it is not necessary to make and file a power of attorney authorizing the attorney to foreclose the mortgage as required by section 580.05. *Quevli v Conner*, 176 M 609, 224 NW 264.

A mortgage foreclosure sale by advertisement made before the attorney's power of attorney was recorded is void; delay of seven months in bringing the action is not laches, and the doctrine of estoppel and unjust enrichment do not apply. *Sheasgreen v Dworsky*, 181 M 79, 231 NW 395.

A corporation is guilty of illegal practice when it retains as its own, the fees earned by its attorney employee. An attorney's fees cannot be charged, unless an attorney is employed and the fees must be for the enrichment of the attorney and not his corporate employer. *In re Otterness*, 181 M 254, 232 NW 318.

A second proceeding to foreclose a mortgage by advertisement will not be set aside simply because of the pending of an action to determine the validity of a prior attempted foreclosure found to be void. *Sheasgreen v Dworsky*, 182 M 142, 233 NW 853.

The title was good, the defective foreclosure having been cured by curative acts. *Baker v Rodgers*, 199 M 148, 271 NW 241.

The foreclosure being invalid, because the power of attorney had not been filed, the trial court did not err in setting aside orders previously made by authority of section 544.32. *Orfield v Morstain*, 199 M 466, 272 NW 260.

The foreclosure sale is not void because neither the mortgagee nor his attorney is present. Bidding at a foreclosure sale is not the practice of law, and the sale is not void where the attorney had a layman submit a bid to the sheriff at the sale. *Klotz v Jeddelloh*, 201 M 355, 276 NW 244.

### 580.06 SALE, HOW AND BY WHOM MADE.

HISTORY. 1878 c. 53 s. 7; G.S. 1878 c. 81 s. 7; G.S. 1894 s. 6034; 1897 c. 262; R.L. 1905 s. 4462; G.S. 1913 s. 8127; G.S. 1923 s. 9607; M.S. 1927 s. 9607.

1. Not judicial
2. By whom conducted
3. Presumptively regular
4. At whose instance
5. Must be at time advertised
6. Inverse order of alienation
7. Re-sale
8. Inadequate price
9. Formal defects disregarded

#### 1. Not judicial

The sale is in pais, under a power, and is not a judicial proceeding. *Merrill v Nelson*, 18 M 366 (335); *Willard v Finnegan*, 42 M 476, 44 NW 985.

#### 2. By whom conducted

The sheriff acts in a ministerial, not judicial, capacity. *Paquin v Braley*, 10 M 379 (304).

The sheriff of Pine county, attached to Chisago county for judicial purposes, was the proper officer to conduct a sale of land lying in Pine county upon foreclosure of a mortgage by advertisement. *Berthold v Holman*, 12 M 335 (221).

A deputy sheriff may conduct a sale either in his own name or in the name of his principal. *Burke v Lacock*, 41 M 250, 42 NW 1016; *Clark v Mitchell*, 81 M 438, 84 NW 327.

Prior to the amendment made by the 1866 code, either the sheriff, or the person named in the mortgage for that purpose, (generally the mortgagor) might conduct the sale. *Simonton v Connecticut Mutual*, 90 M 24, 95 NW 451.

The fact that neither the mortgagee nor his attorney is present, and that a layman has been authorized to submit a bid to the sheriff, does not void the sale. *Klotz v Jeddelloh*, 201 M 355, 276 NW 244.

The sheriff may not hold a mortgage foreclosure sale, after the mortgagor has filed in bankruptcy prior to the disposition of the petition except on direct authority granted by the bankruptcy court. OAG Oct. 12, 1934 (544k).

### 3. Presumptively regular

The sheriff is presumed to have properly discharged his duty in conducting the sale. *Merrill v Nelson*, 18 M 366 (335).

The first attempt to sell was no sale because in violation of the statute made operative by the notice of homestead claim. The power of sale was not exhausted by the attempt. It was not even exercised. The second foreclosure and sale was regular and legal. *Everson v DeSchepper*, 157 M 257, 195 NW 927.

The evidence sustains the findings that when *Birkeland* bought plaintiff's property at the sale, he stood in no fiduciary relationship to plaintiff which interfered with his purchasing for his own use. *Northern Oil v Birkeland*, 164 M 466, 203 NW 228, 205 NW 449, 206 NW 380 .

When the time expires without redemption, the owner of the sheriff's certificate of sale becomes the owner of crops growing on the land. *McCray v Superannuated Fund*, 167 M 295, 208 NW 1001.

### 4. At whose instance

A valid sale can only be had at the instance of the mortgagee, his agent, attorney, executory administrator, or assignee. The sheriff is not authorized to sell on his own motion or at the instance of the mortgagor. *Simonton v Connecticut Mutual*, 90 M 24, 95 NW 451.

### 5. Must be at time advertised

Where the notice set the time of sale at 11 o'clock, a sale at a quarter to 11 was void. *Richards v Finnegan*, 45 M 208, 47 NW 788.

A sale cannot be legally made before the hour named in the notice, and ordinarily not after the expiration of the hour, unless 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. *Simonton v Connecticut Mutual*, 90 M 24, 95 NW 451.

Omission in notice of "a.m." after the hour set for sale, was not fatal. *Slater v Taylor*, 109 M 492, 124 NW 3.

See *Richards v Finnegan*, 45 M 208, 47 NW 788; *Simonton v Connecticut Mutual*, 90 M 24, 95 NW 451.

### 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. *Clark v Kraker*, 51 M 444, 53 NW 706.

Where the owner gives a mortgage upon an entire tract of land, and thereafter conveys away a part of it, one who obtains a judgment lien upon the part retained by the mortgagor, only, has no such equity or right as to entitle him to control a sale of the premises upon foreclosure and require that the tract conveyed away be first sold, or that the entire mortgaged tract be sold as one parcel. *Bowers v Norton*, 175 M 541, 222 NW 71.

### 7. Re-sale

A void sale, or any attempt to sell under the power in the mortgage, does not prevent the mortgagee proceeding again to foreclose under the power. *Bottineau v Aetna Life*, 31 M 125, 16 NW 849.

**8. Inadequate price**

A sale for a grossly inadequate price coupled with irregularity or fraud, may be set aside. *Lalor v McCarthy*, 24 M 417.

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, a mere inadequacy of price is not of itself ground for setting aside. *Johnson v Cocks*, 37 M 530, 35 NW 436.

Where after execution of a mortgage, the mortgagor becomes insane, and the foreclosure was regular in form, but the mortgagee and purchaser who instigated the foreclosure, believing the mortgagor by reason of his condition would not be able to redeem, for the purpose of defrauding him bid in the property at a grossly inadequate price, and there was no redemption, the sale is not absolutely void, but voidable in a court of equity. The only remedy of the mortgagor is an action in equity to set aside the foreclosure, and for leave to redeem, and the mortgagor could not set up an equitable defense to an action in detainer, brought in the municipal court of Duluth, and a judgment in that action is not a bar to the instant action. *Lundberg v Davidson*, 68 M 328, 71 NW 395, 72 NW 71.

**9. Formal defects disregarded**

Mere irregularities in the sale do not affect its validity, unless the statute so prescribed or unless they may operate to prejudice some interested party. *Botineau v Aetna Life*, 31 M 125, 16 NW 849.

Where a mortgage is foreclosed for non-payment of an instalment, the mortgagee may bid in the property for the full amount of the mortgage debt, and after satisfying the amount then due may apply the surplus in paying the amount not then due, paying any further surplus to the mortgagor. The mortgagor has a right of action for that surplus, but this does not invalidate the sale. *Kleinman v Newbert*, 142 M 424, 172 NW 315.

**580.07 POSTPONEMENT.**

**HISTORY.** 1878 c. 53 s. 8; G.S. 1878 c. 81 s. 8; G.S. 1894 s. 6035; R.L. 1905 s. 4463; G.S. 1913 s. 8128; G.S. 1923 s. 9608; M.S. 1927 s. 9608.

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 section 580.07. *Dana v Farrington*, 4 M 433 (335).

It is not necessary to wait until the day originally set for the sale to make the postponement. *Bennett v Brundage*, 8 M 432 (385).

A notice not published for the required time is not cured by a postponement. *Pratt v Tinkcom*, 21 M 142.

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. *Sanborn v Petter*, 35 M 449, 29 NW 64.

The mortgagee cannot charge the expenses of a postponement made at his instance to the mortgagor. *Hobe v Swift*, 58 M 84, 59 NW 831.

An executive order issued as an emergency measure by the governor on Feb. 24, 1933, directing sheriffs to refrain from conducting mortgage foreclosure sales until May 1, 1933, or until further order, was an attempt to exercise legislative power and not within his power. *State ex rel v Moeller*, 189 M 417, 249 NW 330.

Minnesota mortgage moratorium. *Home Building & Loan v Blaisdell*, 290 US 422.

Minnesota mortgage moratorium. Laws 1933, Chapter 339, and biennial renewals. 20 MLR 73.

**580.08 SEPARATE TRACTS.**

**HISTORY.** 1878 c. 53 s. 9; G.S. 1878 c. 81 s. 9; G.S. 1894 s. 6036; R.L. 1905 s. 4464; G.S. 1913 s. 8129; G.S. 1923 s. 9609; M.S. 1927 s. 9609.

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## 580.09 MORTGAGE FORECLOSURE BY ADVERTISEMENT

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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. *Johnson v Williams*, 4 M 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. *Johnson v Williams*, 4 M 260 (183); *Paquin v Braley*, 10 M 379 (304); *Abbott v Peck*, 35 M 499, 29 NW 194; *Willard v Finnegan*, 42 M 476, 44 NW 895; *Clark v Kraker*, 51 M 444, 53 NW 706; *Bay View Land v Myers*, 62 M 265, 64 NW 816.

Government subdivisions are not decisive in determining whether premises consist of one tract. *Worley v Naylor*, 6 M 192 (123).

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. *Worley v Naylor*, 6 M 192 (123); *Merrill v Nelson*, 18 M 366 (335); *Lalor v McCarthy*, 24 M 417.

Separate tracts may be sold as a whole if they constitute one farm. If the certificate does not show that separate tracts were not one farm, the sale will be presumed regular. *Merrill v Nelson*, 18 M 366 (335).

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. *Bottineau v Aetna Life*, 31 M 125, 16 NW 849; *Lowry v Tillyen*, 31 M 500, 18 NW 452.

Where it affirmatively appeared upon the face of the certificate, that many distinct tracts separately situated were grouped together and sold en masse, in one general sale, as one "piece or parcel of land," such certificate on its face disclosed an invalid sale, and was not prima facie evidence of title. *Farnham v Jones*, 32 M 7, 19 NW 83.

The mortgagee is not bound at his peril to ascertain whether any of the mortgaged lands have been alienated or subsequently encumbered. 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. *Abbott v Peck*, 35 M 499, 29 NW 194.

Where a single instrument constitutes in effect several 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. *Hull v King*, 38 M 349, 37 NW 792.

A sale of separate tracts in one parcel is not void but merely voidable on a showing of fraud or prejudice, even though one tract is a homestead. *Willard v Finnegan*, 42 M 476, 44 NW 895; *Ryder v Hulett*, 44 M 353, 46 NW 559; *Clark v Kraker*, 51 M 444, 53 NW 706; *Phelps v Western Realty*, 89 M 319, 94 NW 1085, 1135.

Plaintiff, having attended the sale by the warehouse of his household goods for storage charges, and having made no objection to the manner in which it was conducted, cannot support his action in conversion because each article was not sold separately but in bulk, in the absence of a showing that he was prejudiced, or undue advantage taken of his rights. *Webb v Downes*, 93 M 457, 101 NW 966.

Where a homestead is included with other lands in a mortgage, the homestead claimant may, upon seasonable demand, have the other lands first applied in satisfaction of the mortgage. Laws 1907, Chapter 389, does not curtail the rights or remedies of a homestead claimant, but provides an additional method for the protection of such rights. *Mulroy v Sioux Falls Trust*, 165 M 295, 206 NW 461.

## **580.09 FORECLOSURE FOR INSTALMENTS; BY ADVERTISEMENT OR BY ACTION; SALES; DISPOSITION OF PROCEEDS; REDEMPTION.**

**HISTORY.** 1878 c. 53 ss. 3, 4; G.S. 1878 c. 81 ss. 3, 4; G.S. 1894 ss. 6030, 6031; R.L. 1905 s. 4465; G.S. 1913 s. 8130; G.S. 1923 s. 9610; 1925 c. 280 s. 1; M.S. 1927 s. 9610.

If the owner or his assign annuls the sale for a first instalment by redeeming, a second sale may be had for another instalment. *Daniels v Smith*, 4 M 172 (117); *Standish v Vosberg*, 27 M 175, 6 NW 489; *Herber v Christopherson*, 30 M 395, 15 NW 676.

Under Public Statutes 1858, Chapter 75, Section 3, only instalments subsequent to the first could be foreclosed separately. *Shorts v Cheadle*, 8 M 67 (44).

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Under General Statutes 1866, Chapter 81, Section 3, the rule differed from our present rule where Hackett, a creditor of the mortgagor, was entitled to redeem, and his redemption was valid. Hackett's rights, however, are subject to a lien in favor of plaintiff for unpaid subsequent instalments of the mortgage, and Watkins is entitled to foreclose on account of such lien. *Watkins v Hackett*, 20 M 106 (92); *Taylor v Burgess*, 26 M 547, 6 NW 350.

Under this section and under General Statutes 1878, Chapter 81, Section 3, as modified by General Statutes 1878, Chapter 81, Section 4, which differs from the statute in force when *Watkins v Hackett*, 20 M 106 (92), was decided, 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. *Dick v Moon*, 26 M 309, 4 NW 39; *Fowler v Johnson*, 26 M 338, 3 NW 986; *Martin v Sprague*, 29 M 53, 11 NW 143; *Loomis v Clambey*, 69 M 469, 72 NW 707; *Darelius v Davis*, 74 M 345, 77 NW 214.

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. *Endreson v Larson*, 101 M 417, 112 NW 628.

The rule that the proceeds of a foreclosure sale should be applied pro rata toward the payment of all the notes, or to all debts secured by the mortgage, applies only when the notes are owned by different persons, or where there is more than one debt secured by the mortgages. It does not apply where there is but one debt and all the notes are owned by one person. *Burnside v Craig*, 140 M 404, 168 NW 175; *Kleinman v Newbert*, 142 M 426, 172 NW 315.

The mortgagee in the second mortgage was authorized to declare the whole sum due and foreclose when payments became due upon the first mortgage, though 60 days after default had not elapsed. *Pinger v Atkinson*, 169 M 474, 211 NW 681.

Under Laws 1925, Chapter 280, amending this section, one having taken an assignment of a mortgage under pending foreclosure cannot claim that subsequent instalments are not prior to his title, on the ground that the 1925 amendment was unconstitutional as to mortgages executed prior to its enactment. *Federal Land Bank v Neff*, 174 M 522, 219 NW 914.

A redemption by a junior mortgagee operates as an assignment of the rights of a purchaser at a real estate foreclosure sale, and the redemptioner is subrogated to such rights. In the instant case, the notice of sale stated that the sale would be made subject to unpaid instalments of the mortgage giving the amount of same. *Des Moines Land Bank v Danicourt*, 185 M 435, 241 NW 393.

Under Laws 1925, Chapter 280, where a mortgage debt is due in instalments and there is a foreclosure of any except the last, the mortgage continues as security for the remaining debt. The mortgage and all its covenants including that to pay taxes, remain in force, so that an assignment of rents remains live, and the mortgagee may collect same to apply on or pay taxes. *Peterson v Metropolitan Life*, 189 M 98, 248 NW 667.

The last paragraph of section 580.09 applies only to mortgage foreclosures on instalments, and not where there is a foreclosure for the entire debt. *Morris v Penn Mutual*, 196 M 403, 265 NW 278.

Absent a provision in note and mortgage, and direction in the decree of foreclosure for application of proceeds, such proceeds should be applied by the court as an involuntary payment; and where no controlling equities compel a different application, such proceeds should be applied first on the indebtedness for which personal liability is barred, and then on the balance. *Massachusetts Mutual v Paust*, 212 M 60, 2 NW(2d) 410.

Default in the payment of instalments of principal due under a mortgage and in the payment of taxes and insurance premiums, coupled with cessation of the mortgagor's business and serious neglect and waste in the maintenance of the mortgaged property, justified the appointment of a temporary receiver pending foreclosure for the instalments of principal. *National Guardian v Schwartz*, 217 M 288, 14 NW(2d) 347.

Laws 1925, Chapter 280, amending General Statutes 1923, Section 9610 (section 580.09), so as to permit foreclosure for past-due instalments without discharging the lien of the mortgage construed to apply to previously executed mortgages, as intended, and the law is not unconstitutional, as it merely changed the remedy

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available in case of default. *Prideaux v Des Moines Bank*, 34 F(2d) 308; 282 US 800.

Statute rendering enforceable a contract provision which was unenforceable when made as impairing the contract obligation. 14 MLR 177.

### 580.10 SURPLUS.

**HISTORY.** 1878 c. 53 s. 18; G.S. 1878 c. 81 s. 18; G.S. 1894 s. 6046; R.L. 1905 s. 4466; G.S. 1913 s. 8131; G.S. 1923 s. 9611; M.S. 1927 s. 9611.

Crosby executed a first mortgage to Piper, a second mortgage to Ayer, and sold its premises to Stewart. There being a surplus after foreclosure of the first mortgage, it was paid over to Stewart on his demand. Ayer eight years later brought action against Stewart who was unable to recover, the cause of action being outlawed. *Ayer v Stewart*, 14 M 97 (68).

Surplus on foreclosure for instalments held applicable to instalments not yet due. *Fowler v Johnson*, 26 M 338, 3 NW 986, 6 NW 486; *Taylor v Burgess*, 26 M 547, 6 NW 350.

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. *Taylor v Burgess*, 26 M 547, 6 NW 350; *Johnson v Stewart*, 75 M 20, 77 NW 434.

A junior mortgagee is entitled, in preference to the mortgagor, to receive the surplus, or at least sufficient to satisfy his mortgage. *Brown v Crookston Association*, 34 M 545, 26 NW 907; *Fuller v Langum*, 37 M 74, 33 NW 122; *Gray v Blabon*, 74 M 344, 77 NW 234.

The trust property being sold, the mechanic's lien attaches to the proceeds. *Ness v Davidson*, 49 M 469, 52 NW 46.

The junior mortgagee is entitled to the surplus even though his mortgage is not yet due. *Fagan v People's Savings*, 55 M 437; 57 NW 142.

Taxes paid subsequent to the sale cannot be deducted as against the mortgagor. *Wyatt v Quinby*, 65 M 537, 68 NW 109; *Hamel v Corbin*, 69 M 223, 72 NW 106.

A mortgagor was held entitled to the surplus over a judgment creditor whose judgment was docketed subsequent to the sale. The surplus belongs to the same persons and is subject to the same liens as the land at the time of the sale. The right to recover a surplus is a chose in action independent of the equity of redemption. *Perkins v Stewart*, 75 M 21, 77 NW 434.

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. *Northern Cattle Co. v Munro*, 83 M 37, 85 NW 919.

Where land is sold under foreclosure, the proceeds will be divided pro rata according to the respective interests of parties as they appear, though one may have priority by contract; and in the instant case an unpaid vendor has priority as against a defaulting vendee to the extent of the purchase price. *Weeks v Weeks*, 162 M 93, 202 NW 277.

A judgment creditor is not an assign on whom service must be made. *Paschke v Adams*, 169 M 445, 211 NW 827.

The notice of foreclosure stated the amount due to be \$116.55 more than actually due, and the property was bid in at the sale at \$247.19 more than due. This did not vitiate the sale, and the surplus may be applied on the counter-claim. *Morris v Penn Mutual*, 196 M 403, 265 NW 278.

### 580.11 MORTGAGEE OR ASSIGNEES MAY PURCHASE.

**HISTORY.** 1878 c. 53 s. 10; G.S. 1878 c. 81 s. 10; G.S. 1894 s. 6037; R.L. 1905 s. 4467; G.S. 1913 s. 8132; G.S. 1923 s. 9612; M.S. 1927 s. 9612.

Under an early law in the absence of statutory authority, the mortgagee is regarded as a trustee for the sale, who cannot, except by express authority of his cestui que trust, purchase the mortgaged property. *Baldwin v Allison*, 4 M 25 (11); *Lowell v North*, 4 M 32 (15); *Wilson v Bell*, 17 M 61 (40).

Executors may purchase. *Baldwin v Allison*, 4 M 25 (11); *Wilson v Bell*, 17 M 61 (40).

When a trustee purchases the trust property in his own name, the purchase is voidable, but the mortgagor cannot object. *Baldwin v Allison*, 4 M 25 (11).

Construing Public Statutes, 1858, Chapter 75, Section 9, it was held that the mortgagee could not purchase, unless the sale was conducted by the sheriff or his deputy. *Ramsey v Merriam*, 6 M 168 (104); *Allen v Chatfield*, 8 M 435 (386).

A mortgagee who purchases stands in the same position as any other purchaser. *Tinkcom v Lewis*, 21 M 132.

The mortgagee must purchase "fairly and in good faith." *Lalor v McCarthy*, 24 M 417.

The purchase by a receiver in his own name of a certificate of sale on foreclosure of property subject to the receivership will, at the election of parties interested in the property, be deemed a redemption for their benefit, and the title to the property held in trust for them, and the purchaser must account. *Shadwald v White*, 74 M 208, 77 NW 42.

Where a trustee in a trust deed with authority to do so, bid in the property in his own name, the measure of his liability is to account for the specific property, or in case of conversion of it, for its value or its proceeds at the election of the beneficiaries. *Mareck v Mpls. Trust Co.* 74 M 538, 77 NW 428.

While executors may purchase, a sale cannot be made to the estate of a deceased person. *Kenaston v Lorig*, 81 M 454, 84 NW 323.

The fact that the mortgagee is administrator of the estate of the mortgagor does not deprive him of his legal and equitable right to foreclose his mortgage and become a purchaser in his own right at the sale. *Fleming v McCutcheon*, 85 M 152, 88 NW 433.

Where a mortgage foreclosure has been regularly conducted and the proceeds applied on the note, the fact that the property was bid in for less than its value is not a defense to an action to recover the unpaid part of the note. *Stearns v Carlson*, 162 M 469, 203 NW 212.

Where land conveyed to defraud creditors is subject to a mortgage paramount to claims of creditors, the foreclosure of the mortgage divests all rights under the conveyance and all rights of the creditors to reach the land; and the grantee in the conveyance owes no duty to the creditors, and may purchase at the sale and acquire title free from the claims. *Humphrey v McCleary*, 171 M 198, 213 NW 892.

The owner of a commission mortgage on certain property assigned a one-half interest in it to another, agreeing on collection of the money to account to the assignee for his half. The bidding in of the property is not a collection and plaintiff is not entitled to a money judgment. *Gittins v Petters*, 178 M 360, 227 NW 182.

Neither the mortgagee nor his attorney need attend the sale, and a layman may be authorized to attend the sale and submit a bid to the sheriff. *Klotz v Jeddloh*, 201 M 355, 276 NW 244.

Bad faith in foreclosure and redemption. 1 MLR 458.

### 580.12 CERTIFICATE OF SALE; RECORD; EFFECT.

HISTORY. 1878 c. 53 ss. 11, 12; G.S. 1878 c. 81 ss. 11, 12; G.S. 1894 ss. 6038, 6039; R.L. 1905 s. 4468; G.S. 1913 s. 8133; G.S. 1923 s. 9613; M.S. 1927 s. 9613.

#### I. THE CERTIFICATE

1. Necessity of
2. Execution and assignment
3. Recording
4. Form and sufficiency

#### II. RIGHTS AND LIABILITIES OF PURCHASER

1. Nature of interest during period of redemption
2. Charged with notice of title
3. Protection under the recording act



4. Title rests on mortgage
5. Purchaser succeeds to rights of mortgagee
6. Effect of mortgagee bidding in
7. Right to crops, rents and profits, chattels
8. As a mortgagee in possession; title by adverse possession
9. Right to sue on covenants in mortgagee
10. Nature of title after expiration of redemption period
11. Generally

## I. THE CERTIFICATE

### 1. Necessity of

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 the 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. *Smith v Buse*, 35 M 234, 28 NW 220.

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. *Johnson v Cocks*, 37 M 530, 35 NW 436; *Laroque v Chapel*, 63 M 517, 65 NW 941; *Lindgren v Lindgren*, 73 M 90, 75 NW 1034.

An action may be maintained to compel the sheriff to execute a certificate. *Hokanson v Gunderson*, 54 M 502, 56 NW 172.

### 2. Execution and assignment

A certain instrument purporting and intended to be a "sheriff's deed" on foreclosure sale which contained all that was required in a "certificate of sale" was held operative as a certificate, but not as a deed. *Crombie v Little*, 47 M 581, 50 NW 823.

Delay on the part of the sheriff in executing the certificate does not impair the rights of the purchaser. *Hokanson v Gunderson*, 54 M 499, 56 NW 172; *Rambeck v LaBree*, 156 M 310, 194 NW 643.

The provision that the certificate be executed and recorded within 20 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 20 days after the sale. *Laroque v Chapel*, 63 M 517, 65 NW 941.

Effect and value of assignment of certificate. *Converse v Jenson*, 158 M 209, 197 NW 490.

The evidence sustains a finding that the owner of a farm who acquired an assignment of a sheriff's certificate of mortgage foreclosure sale on his farm did so for the purpose of making redemption and paying the mortgage debt. *Thompson v First National*, 180 M 552, 231 NW 234.

### 3. Recording

Under Iaws 1876, Chapter 39, the statute in force at the time of the foreclosure, the recording of a certificate of sale ten months after the sale is a compliance with the statute. *Ryder v Hulett*, 44 M 353, 46 NW 559.

Failure to record the certificate within 20 days after the sale does not render the sale void. *Crombie v Little*, 47 M 581, 50 NW 823.

An unrecorded assignment of a certificate was held junior to a judgment lien. *Berryhill v Smith*, 59 M 285, 61 NW 144.

A certificate executed and delivered but not recorded does not pass title. *Lindgren v Lindgren*, 73 M 90, 75 NW 1034.

In the instant case, in order to bar the right of redemption of judgment creditor lienholders on the land subordinate to the lien of the mortgage, the certificate of sale must be recorded as provided in this section and within 20 days after the sale. *Hudson v Upper Michigan Co.* 165 M 172, 206 NW 44.

Failure to record certificate of sale within time designated by statute. 10 MLR 355.

#### 4. Form and sufficiency

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. *Merrill v Nelson*, 18 M 366 (335).

The certificate must describe the mortgage. *Golcher v Brisbin*, 20 M 453 (407); *Cable v Mpls. Stock Yards*, 47 M 417, 50 NW 528.

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. *Wells v Atkinson*, 24 M 161; *Crombie v Little*, 47 M 581, 50 NW 823.

The certificate must describe the property sold. *Lowry v Tilleny*, 31 M 500, 18 NW 452; *Smith v Buse*, 35 M 234, 28 NW 220; *Schoch v Birdsall*, 48 M 441, 51 NW 382; *Law v Citizens Bank*, 85 M 411, 89 NW 320.

When a deputy sheriff conducts the sale, he may execute the certificate either in his own name or in the name of his principal. *Burke v Lacock*, 41 M 250, 42 NW 1016; *Clark v Mitchell*, 81 M 438, 84 NW 327.

In a foreclosure under Laws 1862, Chapter 19, Section 3, an error as to the amount and date of the secured note in a certificate was held not fatal. *Cable v Mpls. Stock Yards*, 47 M 417, 50 NW 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. *Crombie v Little*, 47 M 581, 50 NW 823.

A certificate issued to the estate of a deceased person conveys not title. *Kenaston v Lorig*, 81 M 454, 84 NW 323.

## II. RIGHTS AND LIABILITIES OF PURCHASER

### 1. Nature of interest during period of redemption

The fee does not pass from the mortgagor to the purchaser until the expiration of the redemption period. *Daniels v Smith*, 4 M 172 (117); *Donnelly v Simonton*, 7 M 167 (110); *Horton v Moffitt*, 14 M 289 (216); *Loy v Home Insurance*, 24 M 315; *Standish v Vosberg*, 27 M 175, 6 NW 489; *Lindley v Crombie*, 31 M 232, 17 NW 372; *Buchanan v Reid*, 43 M 172, 45 NW 11; *Gates v Ege*, 57 M 465, 59 NW 495; *Carlson v Presbyterian Board*, 67 M 436, 70 NW 3; *Lindgren v Lindgren*, 73 M 90, 75 NW 1034; *Fleming v McCutcheon*, 85 M 152, 88 NW 433.

The interest acquired by the purchaser is not an estate. *Daniels v Smith*, 4 M 172 (117); *Donnelly v Simonton*, 7 M 167 (110); *Turrell v Warren*, 25 M 9.

The interest of the certificate holder is personal property. *Daniels v Smith*, 4 M 172 (117); *Donnelly v Simonton*, 7 M 167 (110); *Loy v Home Insurance*, 24 M 315; *Cooper v Finke*, 38 M 2, 35 NW 469.

The certificate when filed is a lien on real property. *Donnelly v Simonton*, 7 M 167 (110); *Evans v Rhode Island Co.* 67 M 160, 69 NW 715, 1069.

In many respects, but not in all, the interest of the certificate holder is the same as that of the mortgagee before sale. *Horton v Moffitt*, 14 M 289 (216); *Loy v Home Insurance*, 24 M 315; *Buchanan v Reid*, 43 M 172, 45 NW 11; *Evans v Rhode Island*, 67 M 160, 69 NW 715, 1069; *Carlson v Presbyterian Board*, 67 M 436, 70 NW 3.

The purchaser succeeding to the rights of the mortgagee has a lien on the premises to the amount of the purchase price. *Tinkcom v Lewis*, 21 M 132; *Schroeder v Lahrman*, 28 M 75, 9 NW 173; *Buchanan v Reid*, 43 M 172, 45 NW 11; *Bovey DeLaitre v Tucker*, 48 M 223, 50 NW 1038; *Carlson v Presbyterian Board*, 67 M 436, 70 NW 3.

The purchaser is not an assignee of the mortgage nor a creditor of the mortgagor. *Tinkcom v Lewis*, 21 M 132.

The interest of the purchaser is not an interest in real estate within the meaning of the statute authorizing actions to determine adverse claims. *Turrell v Warren*, 25 M 9.

The interest passes by deed. *Lindley v Crombie*, 31 M 232, 17 NW 372; *Cooper v Finke*, 38 M 2, 35 NW 469; *Holmes v State Bank*, 53 M 350, 55 NW 555; *Tuttle v Boshart*, 88 M 284, 92 NW 1117.

Where trees standing upon land at the time of the sale thereof are cut and removed before the expiration of the period of redemption, the purchaser at the execution sale, after his title becomes absolute, may maintain an action for conversion of the logs against a person in possession of them. *Whitney v Huntington*, 34 M 458, 26 NW 631.

There is no technical term to define the interest of the purchaser during the redemption period; 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 his right by one who is not a lawful redemptioner. *Buchanan v Reid*, 43 M 172, 45 NW 11; *Hughes v Olson*, 74 M 237, 77 NW 42; *Brody v Gilman*, 96 M 234, 104 NW 897.

It is a purely statutory interest. *Pioneer Savings v Farnham*, 50 M 315, 52 NW 897.

It has been termed anomalous. *Bean v Germania Life*, 54 M 366, 56 NW 127.

His interest is the same as that of a purchaser at an execution sale during the period of redemption. *Tuttle v Boshart*, 88 M 284, 92 NW 1117.

Where the mortgagee was the purchaser, and before expiration of the redemption period agreed with mortgagor to extend time of payment beyond such period, it was held that the foreclosure was annulled. *Oertel v Pierce*, 116 M 266, 133 NW 797.

Where the foreclosure proceedings are regular and there were defaults giving the right to foreclose, the fact that the mortgagor remained in possession was in no way proof of fraudulent intent to defraud judgment creditors. *Twin Ports Co. v Whiteside*, 218 M 78, 15 NW(2d) 125.

Mortgagee on purchasing at foreclosure sale for total amount of mortgage, ceased to be a creditor of mortgagor and become purchaser with vested right to become owner or to receive payment of bid on redemption. *In re Klein*, 9 F. Supp. 57; *In re Stacy*, 9 F. Supp. 61.

Right of purchaser to crops growing on mortgaged land at time of foreclosure and sale. 15 MLR 717.

### 2. Charged with notice of title

The purchaser is charged with notice of the rights of any person other than the mortgagor in possession. *Carleton College v McNoughton*, 26 M 194, 2 NW 688.

If the mortgage was void, the purchaser acquires no title. *Coles v Yorks*, 28 M 464, 10 NW 775.

Purchaser is charged with notice of what property the mortgage covers and what property may be properly sold. *Bottineau v Aetna Life*, 31 M 125, 16 NW 849.

A foreclosure of a mortgage under statute is not founded upon any judgment or decree of any court. It is the mere act of the mortgagee who cannot make that good and effectual by a sale which was unlawful and void in its inception. *Jordan v Humphrey*, 31 M 495, 18 NW 450.

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 by that fact. When the mortgage contains covenants of title which run with the land, different considerations apply. *American Building v Woleen*, 52 M 23, 53 NW 867.

### 3. Protection under the recording act

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. *Palmer v Bates*, 22 M 532, *Merchant v Woods*, 27 M 396, 7 NW 826; *Bausman v Eads*, 46 M 148, 48 NW 769.

Possession of the mortgaged premises is not notice of an unrecorded release. *Palmer v Bates*, 22 M 532.

The purchaser is charged with notice of equities appearing on the face of the record. *Wilson v Eigenbrodt*, 30 M 4, 13 NW 907.

The purchaser has a right to rely on the title as disclosed by the records. *Solberg v Wright*, 33 M 224, 22 NW 381; *Brown v Union Depot*, 65 M 508, 68 NW 107.

#### 4. Title rests on mortgage

The purchaser acquires just what the mortgagee has the right to sell under the power, no more and no less. *Hillebert v Porter*, 28 M 496, 11 NW 84.

The sale transfers all the interest of the mortgagor in the premises as described in the mortgage. *Lowry v Tillyen*, 31 M 500, 18 NW 452.

The mortgage must be sufficient to operate as a conveyance as soon as the equity of redemption is barred. *Foster v Johnson*, 39 M 378, 40 NW 255.

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. *Burke v Lacock*, 41 M 250, 42 NW 1016; *Security Bank v Holmes*, 65 M 531, 68 NW 113.

The mortgage ripens into a perfect title through the process of foreclosure. *Hokanson v Gunderson*, 54 M 499, 56 NW 172.

There being no redemption the purchaser at a mortgage foreclosure sale acquires the entire mortgagor's interest. *Beliveau v Beliveau*, 217 M 235, 14 NW(2d) 360.

#### 5. Purchaser succeeds to rights of mortgagee

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. *Johnson v Sandhoff*, 30 M 197, 14 NW 889; *Holton v Bowman*, 32 M 191, 19 NW 734; *Coles v County of Washington*, 35 M 124, 27 NW 497; *Rogers v Benton*, 39 M 39, 38 NW 765; *Buchanan v Reid*, 43 M 172, 45 NW 11; *Jellison v Halloran*, 44 M 199, 46 NW 332; *Bitzer v Campbell*, 47 M 221, 49 NW 691; *Brame v Towne*, 56 M 126, 57 NW 454; *Backus v Burke*, 63 M 272, 65 NW 459; *Law v Citizens Bank*, 85 M 411, 89 NW 320.

The purchaser does not succeed to other securities held by the mortgagee. *Lawton v St. Paul Loan*, 56 M 353, 57 NW 1061.

In the instant case, the purchaser is not a stranger to the mortgage. Conceding that the foreclosure sale of the chattels was invalid, the purchaser, with reference to the mortgagor, stood in the same relation as did the mortgagee, and in an action against such purchaser to recover the value of the property the mortgagor is entitled to recover only the excess, if any, in the value of the property over the indebtedness. *Berg v Olson*, 88 M 392, 93 NW 309.

The purchaser acquires every right and 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. *Tomasko v Cotton*, 200 M 69, 273 NW 628.

#### 6. 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 the mortgage becomes absolute. *Donnelly v Simonton*, 7 M 167 (110); *Horton v*

Moffitt, 14 M 289 (216); Carlson v Presbyterian Board, 67 M 436, 70 NW 3; Fleming v McCutcheon, 85 M 152, 88 NW 433.

The mortgagee 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. Lawton v St. Paul Loan, 56 M 353, 57 NW 1061; Evans v Rhode Island Trust, 67 M 160, 69 NW 715, 1069.

He stands in no better or different position than a stranger who purchases. Lawton v St. Paul Loan, 56 M 353, 57 NW 1061.

Where the holder of first and second mortgages executed by the same mortgagor and covering the same real estate, forecloses his second mortgage, and thereby, in default of redemption, gets title in fee, the lien of the first mortgage is merged in the fee; and the debt thereby secured is discharged where it does not appear that there was intention to prevent such merger. Mulligan v Farmers National, 194 M 451, 260 NW 630.

### 7. Right to crops, rents and profits, chattels

If the purchaser is out of possession, he is not entitled, during the year of redemption, to crops or timber, but he may restrain waste. Berthold v Holman, 12 M 335 (221); National Fire v Broadbent, 77 M 175, 79 NW 676.

If the purchaser is in possession with the rights of a "mortgagee in possession," he is entitled to crops raised by himself, but is accountable for rents and profits. Holton v Bowman, 32 M 191, 19 NW 734.

During the year of redemption, the purchaser is not entitled to rents and profits. Pioneer Savings v Farnham, 50 M 315, 32 NW 897; McDowell v Hillman, 50 M 319, 32 NW 897.

On expiration of the redemption period chattels on the premises belong to the purchaser as against a stranger. O'Donnell v Burroughs, 55 M 91, 56 NW 579.

It has been held that based upon a specific agreement, the mortgagor may acquire the right to crops maturing after the expiration of the redemption period. Mitchell v Tschida, 71 M 133, 73 NW 625.

When he obtains possession after the expiration of the redemption period, he is entitled to all the crops then growing on the premises, and thereafter may maintain an action in the nature of replevin or trover therefor, if they are severed and carried away by another. Marks v Jones, 71 M 136, 73 NW 719.

An injunction will not issue to restrain the mortgagor from removing crops grown and harvested by him prior to the expiration of the period of redemption. Marks v Jones, 71 M 136, 73 NW 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 his tenant. Aultman v O'Dawd, 73 M 58, 75 NW 756.

Where premises are falling into disrepair but are used in usual course of husbandry as in previous years, the purchaser at a mortgage sale is not entitled to a receiver to apply rents to repairs during year of redemption. Greene v Taylor, 188 M 381, 246 NW 921.

There was no redemption and plaintiff went into possession February 24, 1931. Defendant notified plaintiff that premises would be vacated March 31, 1931. Plaintiff without consent of defendant could not convert the tenancy at will into a tenancy under lease, and plaintiff cannot recover rent for April, May, and June, 1931. Benz v Willar, 198 M 311, 269 NW 840.

### 8. 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. Johnson v Sandhoff, 30 M 197, 14 NW 889; Rogers v

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Benton, 39 M 39, 38 NW 765; Buchanan v Reid, 43 M 172, 45 NW 11; Backus v Burke, 63 M 272, 65 NW 459; Law v Citizens Bank, 85 M 411, 89 NW 320.

A vendee of the purchaser has the same right as the purchaser in this regard. Johnson v Sandhoff, 30 M 197, 14 NW 889; Holton v Bowman, 32 M 191, 19 NW 734.

If the purchaser remains in possession until the right of redemption by the mortgagor is barred, he becomes invested with a legal title. Rogers v Benton, 39 M 39, 38 NW 765; Jellison v Halloran, 44 M 199, 46 NW 332; Russell v Akeley, 45 M 376, 48 NW 3; Law v Citizens Bank, 85 M 411, 89 NW 320;

And may redeem from the foreclosure of a senior lien. Law v Citizens Bank, 85 M 411, 89 NW 320.

### 9. Right to sue on covenants in mortgagee

The purchaser buys the title as warranted and guarded by the covenants in the mortgage. American Bldg. v Waleen, 52 M 23, 53 NW 867; American Bldg. v Stoneman, 53 M 212, 54 NW 1115; Lawton v St. Paul Loan, 56 M 353, 57 NW 1061; Pioneer Savings v Freeburg, 59 M 230, 61 NW 25; Security Bank v Holmes, 65 M 531, 68 NW 113; 68 M 538, 71 NW 699.

A covenant against encumbrances runs with the land, and a purchaser may maintain an action thereon. Security Bank v Holmes, 65 M 531, 68 NW 113; 68 M 538, 71 NW 699.

### 10. Nature of title after expiration of 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. Watkins v Hackett, 20 M 106 (92); Tinkcom v Lewis, 21 M 132; Martin v Fridley, 23 M 13; Gates v Ege, 57 M 465, 59 NW 495.

The purchaser acquires just the interest of the mortgagor, no more and no less. Hillebert v Porter, 28 M 496, 11 NW 84.

The purchaser is the owner and entitled to all the rights of ownership. Moritz v City of St. Paul, 52 M 409, 54 NW 370.

The purchaser 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. Swedish-American v Connecticut Mutual, 83 M 377, 86 NW 420.

### 11. Generally

Purchasers of different tracts are distinct, one from the other. Tinkcom v Lewis, 21 M 132.

Where the mortgagor remains on the land, his possession is deemed amicable, and in subordination to the title of the purchaser until the contrary appears. Lowry v Tillyen, 31 M 500, 18 NW 452.

Where trees standing on the land at time of sale were cut and removed before the expiration of the redemption period, after the purchaser's title becomes absolute, he maintains an action in conversion of the logs against any one in possession who refuses to surrender them on proper demand. Whitney v Huntington, 34 M 458, 26 NW 631.

The purchaser takes free from all claims or liens arising from the mortgagor. Jacoby v Crowe, 36 M 93, 30 NW 441.

The evidence sustains a finding that the mortgage was foreclosed, and the purchase price paid by the purchaser at the sale before the mortgagees were made parties to the mechanic's lien foreclosure action. Hokanson v Gunderson, 54 M 499, 56 NW 172.

The owner of the land covenanted to keep a dam in repair, but while the mortgagees joined in the deed, they did not join in the covenant, and all parties agreed that the plaintiff was to look to the mortgagor only for performance of the covenant. The defendant cannot be forced to perform the covenant for the

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deed to him expressly provided his release. *Stanton v Sauk Rapids Co.* 74 M.287, 77 NW 1.

The purchaser acquires all easements appurtenant to and necessary for the enjoyment of the premises. *Swedish-American v Connecticut Mutual*, 83 M 377, 86 NW 420.

The purpose of filing the redemption papers is to inform other lien creditors of the amount they will have to pay if they choose to redeem. The statute was intended for their protection, and they alone can take advantage of the non-compliance with its terms. If the papers are on file when a junior redemptioner exercises his right, the essential purpose of the statute is served. *Rambeck v LaBree*, 156 M 314, 194 NW 643.

A clear departure from the statutory requirements of foreclosure will vitiate the proceedings. In order to bar junior judgment creditors, the right to redeem the certificate of sale must be recorded within the time provided in this section. *Hudson v Upper Michigan Land*, 165 M 172, 206 NW 44.

The evidence sustains a finding that the owner of a farm who acquired an assignment of a sheriff's certificate of sale on his farm did so for the purpose of making a redemption and paying the mortgage debt. *Thompson v First National*, 180 M 552, 231 NW 234.

Purchaser at mortgage foreclosure sale is not entitled to reimbursement during year of redemption for taxes paid by him which were a lien at time of sale. *Benz v Willar*, 198 M 311, 269 NW 840.

Neither the mortgagee nor his attorney need be present at the sale, but may authorize a layman to submit their bid to the sheriff. *Klotz v Jeddelloh*, 201 M 355, 276 NW 244.

Misrepresentation to client of date when foreclosure record was filed is a ground for disbarment of the attorney. *In re Larson*, 210 M 416, 298 NW 707.

Statutory provision prohibiting instituting or maintaining foreclosure proceedings after mortgagors filing a petition of agricultural composition does not extend or toll the period of redemption, where mortgagors filed petition more than four months after foreclosure sale, and no further steps were required of mortgagee to obtain title. *In re Klein*, 9 F Supp. 59.

Effect of foreclosure upon subsequent lease and lessee. 21 MLR 610.

## 580.13 PREMISES IN MORE THAN ONE COUNTY; RECORD.

HISTORY. 1899 c. 182; 1903 c. 342; R.L. 1905 s. 4470; G.S. 1913 s. 8136; G.S. 1923 s. 9616; M.S. 1927 s. 9616.

## 580.14 EXECUTION AFTER EXPIRATION OF TERM.

HISTORY. R.L. 1905 s. 4471; G.S. 1913 s. 8137; G.S. 1923 s. 9617; M.S. 1927 s. 9617.

A certain instrument purporting and intended to be a "sheriff's deed" on foreclosure sale, which contained all that was required in a "certificate of sale" was held operative as a certificate of sale, although unauthorized as a deed. *Crombie v Little*, 47 M 581, 50 NW 823.

## 580.15 PERPETUATING EVIDENCE OF SALE.

HISTORY. 1878 c. 53 ss. 19, 20; G.S. 1878 c. 81 ss. 19, 20; G.S. 1894 ss. 6047, 6048; 1895 c. 216; R.L. 1905 s. 4472; G.S. 1913 s. 8138; G.S. 1923 s. 9618; M.S. 1927 s. 9618; 1941 c. 477.

The affidavits are prima facie evidence of the facts stated therein; or at least of facts authorized to be stated. *Griswold v Taylor*, 8 M 342 (301); *Golcher v Brisbin*, 20 M 453 (407); *Sanborn v Petter*, 35 M 449, 29 NW 64.

Public Statutes 1858, Chapter 84, Section 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. *Goenen v Schroeder*, 18 M 66 (51); *Merrill v Nelson*, 18 M 366 (355).

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If the affidavits filed are defective, correct ones may subsequently be filed. *Golcher v Brisbin*, 20 M 453 (407).

The affidavit of the publisher is sufficient. *Menard v Crowe*, 20 M 448 (402); *Kipp v Cook*, 46 M 535, 49 NW 257.

Affidavits are not essential to the validity of the sale. *Golcher v Brisbin*, 20 M 453 (407); *Burke v Lacock*, 41 M 250, 42 NW 1016.

An affidavit of publication must state all the statutory requirements of publication. *Golcher v Brisbin*, 20 M 453 (407); *Sanborn v Petter*, 35 M 449, 29 NW 64.

Where title is to be made under a mortgage, and foreclosure pursuant to the powers therein, Laws 1883, Chapter 112, does not make the certificate of sale proof of the mortgage and power. *Anderson v Schultz*, 37 M 76, 33 NW 440.

Rights of guarantor holding second mortgage on redeeming from the purchaser at a foreclosure sale under the first mortgage. 9 MLR 164.

Double hazard of note and mortgage. 16 MLR 134.

### 580.16 ENTRY IN RECORD.

HISTORY. 1878 c. 53 s. 21; G.S. 1878 c. 81 s. 21; G.S. 1894 s. 6049; R.L. 1905 s. 4473; G.S. 1913 s. 8139; G.S. 1923 s. 9619; M.S. 1927 s. 9619.

### 580.17 AFFIDAVIT OF COSTS.

HISTORY. 1878 c. 53 s. 23; G.S. 1878 c. 81 s. 23; 1889 c. 101 s. 1; G.S. 1894 s. 6051; R.L. 1905 s. 4474; G.S. 1913 s. 8140; G.S. 1923 s. 9620; M.S. 1927 s. 9620.

Failure to file the affidavit does not invalidate the sale. *Johnson v Cocks*, 37 M 530, 35 NW 436; *Johnson v N. W. Loan*, 60 M 393, 62 NW 381; *Laroque v Chapel*, 63 M 517, 65 NW 941; *Farnsworth v Commonwealth*, 84 M 62, 86 NW 877.

The statute is mandatory. *Johnson v N. W. Loan*, 60 M 393, 62 NW 381; *Brown v Scandia Loan*, 61 M 527, 62 NW 1040; *Laroque v Chapel*, 63 M 517, 65 NW 941; *Brown v Baker*, 65 M 133, 67 NW 793; *Itasca Invest. v Dean*, 84 M 388, 87 NW 1020.

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. *Johnson v N. W. Loan*, 60 M 393, 62 NW 381.

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; but a party cannot extend the time by failing to procure and record his certificate of sale within the 20 days after the sale. *Laroque v Chapel*, 63 M 517, 65 NW 941.

The one-year limitation of section 580.18 is not applicable. *Brown v Baker*, 65 M 133, 67 NW 793.

Where suit is brought to recover costs and disbursements of sale it is not a defense that a subsequent mortgagee is entitled to the surplus. *Truesdale v Sidle*, 65 M 315, 67 NW 1004; *Itasca Invest. v Dean*, 84 M 388, 87 NW 1020.

Whether the affidavit is evidence of the facts required to be stated is an open question. It is not evidence of the facts not required to be stated. *Wyatt v Quinby*, 65 M 537, 68 NW 109.

The mere fact that the mortgagee assigns his certificate of foreclosure to a third party, at the request of the mortgagor, on receiving from the third party the amount of his bid and interest does not estop the mortgagor from recovering a surplus from the mortgagee. *Johnson v Stewart*, 75 M 20, 77 NW 435.

This statute is constitutional. *Perkins v Stewart*, 75 M 21, 77 NW 434.

In suing for a surplus, no demand is necessary; and the mortgagee is chargeable with interest. *Perkins v Stewart*, 75 M 21, 77 NW 434.

A party may have 30 days from the sale in which to file the affidavit. *Farnsworth Loan v Commonwealth*, 84 M 62, 86 NW 877.

In an action to recover a surplus in the hands of the mortgagee, by reason of his failure to file an affidavit of costs, the complaint states a cause of action. *Itasca Co. v Dean*, 84 M 388, 87 NW 1020.

Attorney's fees cannot be charged unless an attorney at law is employed. *In re Otterness*, 181 M 257, 232 NW 318.



**580.18 EXCESSIVE COSTS OR INTEREST.**

**HISTORY.** 1878 c. 53 s. 24; G.S. 1878 c. 81 s. 24; G.S. 1894 s. 6052; R.L. 1905 s. 4475; G.S. 1913 s. 8141; G.S. 1923 s. 9621; M.S. 1927 s. 9621.

An action under this section may be brought immediately after the sale without waiting for the expiration of the period of redemption. *Beal v White*, 28 M 6, 8 NW 829.

This section is not applicable to excessive charges actually paid or incurred. Good faith is no defense. The burden of proof is on the plaintiff who demands the penalty. *Hobe y Swift*, 58 M 84, 59 NW 831; *Johnson v N. W. Loan*, 60 M 393, 62 NW 381.

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. *Johnson v N. W. Loan*, 60 M 393, 62 NW 381.

The remedy is not exclusive. *Eliason v Sidle*, 61 M 285, 63 NW 730.

The one-year limitation does not apply to an ordinary action for the surplus. *Brown v Baker*, 65 M 133, 67 NW 793.

Whether a cause of action under this section is assignable is an open question. A mortgagee is liable for treble the costs of postponement of sale charged to the mortgagor. *Lynath v Dickerman*, 65 M 471, 67 NW 1143.

**580.19 CERTIFICATE AS EVIDENCE.**

**HISTORY.** 1883 c. 112 s. 1; G.S. 1878 Vol. 2 (1888 Supp.) c. 81 s. 26a; G.S. 1894 s. 6054; 1901 c. 374; R.L. 1905 s. 4476; G.S. 1913 s. 8142; G.S. 1923 s. 9622; M.S. 1927 s. 9622.

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. *Goenen v Schroeder*, 18 M 66 (51).

The certificate is prima facie evidence that the sale was regular as regards selling in parcels. *Merrill v Nelson*, 18 M 366 (335).

A certificate has no force as evidence unless it conforms substantially to the statute. *Nelson v Cent. Land Co.* 35 M 408, 29 NW 121.

It is only prima facie and not conclusive evidence. *Sanborn v Petter*, 35 M 449, 29 NW 64; *Burke v Lacock*, 41 M 250, 42 NW 1016; *Richards v Finnegan*, 45 M 208, 47 NW 788; *Casey v McIntyre*, 45 M 526, 48 NW 402.

It is 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." *Anderson v Schultz*, 37 M 76, 33 NW 440.

It is prima facie evidence that the notice of sale was properly published. *Burke v Lacock*, 41 M 250, 42 NW 1016.

The statute is constitutional. *Burke v Lacock*, 41 M 250, 42 NW 1016.

A certificate executed by a deputy sheriff in his own name has the same force as a certificate in the name of the sheriff. *Burke v Lacock*, 41 M 250, 42 NW 1016.

It is prima facie evidence that a postponement was duly made. *Mosness v Lacy*, 73 M 283, 76 NW 34; *Schlaag v Gooding*, 98 M 261, 108 NW 11.

It seems that a certificate has no force as evidence even of regularity until after the period of redemption has expired. *Hebert v Turgeon*, 84 M 34, 86 NW 757.

In an action of unlawful detainer, brought against mortgagors after the year of redemption had expired, the sheriff's certificate of sale was prima facie evidence of title in the purchaser. *Nelson v Johnson*, 167 M 432, 209 NW 320.

Similarly, the "prima facie evidence of the existence of facts" as stated in the fire marshal's order as provided by section 73.15, does not change the burden of proof. It only stands until its weight is met by competent evidence to the contrary. The prima facie case the statute creates simply means that the burden of going forward with the evidence shifts. *State Fire Marshal v Sherman*, 201 M 595, 277 NW 249.

King's interests are derived from an assignment of the certificate of the mortgage sale. His interests are identical with those of the purchaser from whom

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he received the assignment. *Twin Ports Co. v Whiteside*, 218 M 78, 15 NW(2d) 126.

## 580.20 ACTION TO SET ASIDE FOR CERTAIN DEFECTS.

**HISTORY.** 1883 c. 112 s. 1; G.S. 1878 Vol. 2 (1888 Supp.) c. 81 s. 26a; G.S. 1894 s. 6054; 1901 c. 374; R.L. 1905 s. 4477; G.S. 1913 s. 8143; G.S. 1923 s. 9623; M.S. 1927 s. 9623.

The statutory limitation as to time is inapplicable to an action in ejectment against mortgagor who has remained in actual possession. *Sanborn v Petters*, 35 M 449, 29 NW 64.

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. *Abbott v Peck*, 35 M 499, 29 NW 194; *Yeager v Kelsey*, 46 M 402, 48 NW 767; *Clark v Kraker*, 51 M 444, 53 NW 706; *Saxe v Rice*, 64 M 190, 66 NW 268.

This section 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. *Bausman v Kelley*, 38 M 197, 36 NW 333.

Even if the defect is one of substance, 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. *Bausman v Kelley*, 38 M 197, 36 NW 333; *Sanborn v Eads*, 38 M 211, 36 NW 338; *Dimond v Mannheim*, 61 M 178, 63 NW 495.

Where the defect is one of substance the same promptness as may be required in other cases is not required. *Hull v King*, 38 M 349, 37 NW 792; *Burke v Backus*, 51 M 174, 53 NW 458.

The mortgagor may enforce his legal remedies until barred by the statute of limitations. *Welsh v Cooley*, 44 M 446, 46 NW 908.

This section is valid as a statute of limitations if the purchaser goes into possession. *Russell v Akeley*, 45 M 376, 48 NW 3.

This section has been held applicable where the notice of sale was not published the requisite time, and where the notice contained an inaccuracy as to the date when the mortgage was recorded. *Russell v Akely*, 45 M 376, 48 NW 3; *Mogan v Carter*, 54 M 141, 55 NW 1117.

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. *Bitzer v Campbell*, 47 M 221, 49 NW 691.

If construed liberally, it includes all defects in the notice. *Bitzer v Campbell*, 47 M 221, 49 NW 691.

It is not applicable in a case where an assignment has not been recorded. *Burke v Backus*, 51 M 174, 53 NW 458; *Burke v Baldwin*, 51 M 181, 53 NW 460.

This section presupposes the existence of the conditions authorizing the exercise of the power and deals only with certain specified irregularities in its exercise. *Burke v Backus*, 51 M 174, 53 NW 458.

Where a mortgagor waives an irregularity and no other person is in a position to question the regularity of the sale, and has in due time executed a deed to perfect the title of the mortgagee, he cannot insist on an invalidity in the foreclosure. *Saxe v Rice*, 64 M 190, 66 NW 268.

The statute operates to cure and validate defective sales. *Johnson v Peterson*, 90 M 503, 97 NW 384.

The statute is not unconstitutional as to one in possession prior to enactment. *Fitger v Alger*, 130 M 520, 153 NW 997.

Under this section an attack on a foreclosure because of lack of service on the occupant is barred after the five-year period has expired. *Lindquist v Agre*, 155 M 20, 191 NW 1010.

In an action to set aside a mortgage foreclosure on the ground of fraud, plaintiff must set forth the facts constituting the alleged fraud. *Hutchins v Bassin*, 170 M 126, 212 NW 202.

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Where an administrator forecloses a mortgage and bids in the property in his own name as administrator, an action to set aside the foreclosure on the ground that no default has occurred is properly brought in the district court and against the administrator as sole defendant. *Scott v Nordin*, 171 M 469, 214 NW 472.

A second proceeding to foreclose a real estate mortgage by advertisement will not be set aside simply because of the pendency of an action to determine the validity of a prior attempted foreclosure which was found void. *Sheasgreen v Dworsky*, 182 M 142, 233 NW 853.

A limitation law such as this section cannot compel a resort to legal proceedings by one who is already in complete enjoyment of all he claims, nor can such a law compel one party to forfeit his rights to another for failure to bring suit against such party within the time specified to test validity of claim. *Hammon v Hatfield*, 192 M 259, 256 NW 94.

Where the mortgagor brings action to set aside the foreclosure, and the mortgagee alleges a valid foreclosure, and counter-claims for damage for detention of the premises, and the mortgagor does not demur or in his reply challenge the legal standing of the counter-claim, he cannot object at the trial to litigation of the counter-claim. *Morris v Penn Mutual*, 196 M 403, 265 NW 278.

The "prima facie evidence of the existence of the facts" as stated in the fire marshal's order does not change the burden of proof, but simply means that the burden of going forward with the evidence shifts. *State Fire Marshal v Sherman*, 201 M 594, 277 NW 249.

Knowledge of the foreclosure was sufficient to put plaintiff on prompt inquiry as to the regularity of the proceedings, and she is chargeable with the knowledge she would have obtained had she made the inquiry. *Bjornstad v Penn Mutual*, 202 M 145, 277 NW 521.

Mortgage foreclosure sale under state law, to mortgage holder during pendency of farmer-mortgagor's conciliation proceedings, is invalid, though mortgage holder had no knowledge of conciliation proceedings. *In re Neumann*, 12 F. Supp. 427.

A statute requiring suits to recover land on ground of defects in execution of instrument to be brought within ten years after recording of an instrument manifests intent to quiet uncertainties concerning land titles, including defects in publication of notice of foreclosure sale. *Cone v Parish*, 32 F. Supp. 427.

### 580.21 ACTION TO SET ASIDE SALE; LIMITATION.

**HISTORY.** 1889 c. 31 s. 1; G.S. 1894 s. 6055; R.L. 1905 s. 4478; G.S. 1913 s. 8144; G.S. 1923 s. 9624; M.S. 1927 s. 9624.

In 1903 it was held that a defective foreclosure of a mortgage under the power therein contained, made in 1874, was validated by the curative acts of 1883 and 1889. *Johnson v Peterson*, 90 M 503, 97 NW 384.

A statutory mortgage foreclosure sale of record, and fair on its face, is not open to attack upon any ground after the limitation prescribed by Revised Laws 1905, Section 4478 (section 580.21), has run. *Finley v Erickson*, 122 M 237, 142 NW 198.

In the advertisement the description was so altered as to omit several lots. The error was patent on the face of the papers and was known to the mortgagor, who did not move, and no third parties have intervened. The court properly granted relief by directing foreclosure anew by action. *Romkey v Saumweber*, 170 M 438, 212 NW 816.

### 580.22 INTEREST OF PURCHASER; ATTACHMENT OR JUDGMENT.

**HISTORY.** 1878 c. 53 s. 17; G.S. 1878 c. 81 s. 17; G.S. 1894 s. 6045; R.L. 1905 s. 4479; G.S. 1913 s. 8145; G.S. 1923 s. 9625; M.S. 1927 s. 9625.

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

The right, during the time for redemption, acquired by the purchaser at an execution sale, will pass by his deed; and when the time to redeem expires with-

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out redemption, the title under the execution sale will vest in the grantee in the deed. *Lindley v Crombie*, 31 M 232, 142 NW 198.

### 580.23 REDEMPTION BY MORTGAGOR.

HISTORY. 1878 c. 53 s. 13; G.S. 1878 c. 81 s. 13; G.S. 1894 s. 6041; 1899 c. 37; R.L. 1905 s. 4480; G.S. 1913 s. 8146; G.S. 1923 s. 9626; M.S. 1927 s. 9626.

#### I. RIGHT OF REDEMPTION

1. Incident to mortgages
2. Right favored
3. How lost
4. Statute must be followed
5. Release
6. Status of sheriff
7. Reciprocal rights
8. Assignment of certificate as a redemption

#### II. BY MORTGAGOR OR ASSIGN

1. Assign defined
2. By part owner
3. By wife
4. Time to redeem; extension
5. Amount required to redeem

#### III. GENERALLY

##### I. RIGHT OF REDEMPTION

###### 1. Incident to mortgages

That a mortgagee proceeding to foreclose under the power, proposes to make an absolute sale without right of redemption, is no ground to enjoin the sale. Other remedies are available. *Armstrong v Sanford*, 7 M 49 (34).

The right or equity of redemption is an incident inseparable from every mortgage, and is not affected by a default (but see *Clearwater Bank v Bagley*, 116 M 4, 133 NW 91). *Hill v Edwards*, 11 M 22 (5).

The right to foreclose and the right to redeem are reciprocal. The right to redeem exists in spite of an express convention in the mortgage to the contrary. *Holton v Meighen*, 15 M 69 (50).

Possession of mortgaged premises in no way affects the right of foreclosure or redemption. *Parsons v Naggle*, 23 M 328.

A mortgage must be deemed to have been made with reference to the statutory right of redemption by creditors. *Martin v Sprague*, 29 M 53, 11 NW 143.

Foreclosure sale of franchises and real and personal property of a public service corporation such as a telephone company, may be made without right of redemption. *Clearwater Bank v Bagley*, 116 M 4, 133 NW 91.

A mortgagor is entitled to the full usufruct of the mortgaged land until his rights are barred by foreclosure of the mortgage and expiration of the period of redemption. This applies to rents and royalties accruing under a mining lease. This right cannot be contracted away as a condition of the mortgage. *Orr v Bennett*, 135 M 443, 161 NW 165.

###### 2. Right favored

A purchaser at an abortive mortgage foreclosure sale, who has gone into possession with consent of mortgagor, and in the belief the foreclosure was valid, and has remained in possession until the exemption period has expired, has such subsisting interest under the mortgagor's title that he may redeem

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under General Statutes 1894, Section 6041 (section 580.23), from the foreclosure of a senior lien, *Law v Citizens' Bank*, 85 M 411, 89 NW 320.

The provisions of the statutes which confer the right to redeem from foreclosure of a mortgage by advertisement and which regulate its existence are remedial in character and should receive such liberal construction as will advance the remedy, rather than restrict the right of redemption. *Lightbody v Lammers*, 98 M 203, 108 NW 846.

The right of redemption, whether by the owner or by a subsequent lien creditor, is a right favored by law, and statutes are to be construed liberally in favor of the redemptioner. *Tamasko v Cotton*, 200 M 69, 273 NW 628.

A mortgagor may not as part of the mortgage transaction contract away his equity of redemption. He may bargain away, subsequent to the execution of the mortgage, said equity to the mortgagee, but not as a part of the mortgage, or collateral to it. All such transactions are carefully scrutinized by the court to the end that the mortgagee may not take advantage of the mortgagor's necessities. *Twenty Associates v First Nat'l*, 200 M 211, 273 NW 696.

### 3. How lost

It is not lost by a surrender of the note and an advancement of an additional sum by the lender equal, with previous loan, to the agreed value of the land mortgaged. *Jones v Blake*, 33 M 362, 23 NW 538.

The mortgagor is estopped from redeeming when with knowledge of the invalidity he permits the mortgagee to take possession. *Purcell v Thornton*, 128 M 255, 150 NW 899.

Strict legal rights in respect to the time for redemption from foreclosure sale may be waived; and the mortgagor's omission to redeem is deemed sufficient consideration for mortgagee's promise to extend the time. *Ellingson v Hoffman*, 182 M 510, 234 NW 867.

Strict foreclosure. 23 MLR 388.

### 4. Statute must be followed

After a foreclosure by advertisement the only right of redemption, by mere act of the parties, is that given by statute and can be exercised only as prescribed by statute. *Dickerson v Hayes*, 26 M 100, 1 NW 834; *Cuilerier v Brunelle*, 37 M 71, 33 NW 123.

### 5. Release

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. *Sprague v Martin*, 29 M 226, 13 NW 34.

The mortgagor may sell or release his equity of redemption to the mortgagee. *Niggeler v Maurin*, 34 M 118, 24 NW 369; *Marshall v Thompson*, 39 M 137, 39 NW 309; *DeLancey v Finnegan*, 86 M 255, 90 NW 387; *Aretz v Kloos*, 89 M 432, 95 NW 216, 769.

Although a mortgagor may not, at the time of making a mortgage, bargain or sell away his equity of redemption to the mortgagee, he may do so subsequently under certain circumstances. *O'Connor v Schwan*, 190 M 177, 251 NW 180; *Twenty Associates v First Nat'l*, 200 M 211, 273 NW 696.

### 6. Status of sheriff

The sheriff in receiving money paid for redemption, acts as an officer of the law and not as agent of the party. It is not subject to levy. *Horton v Moffitt*, 14 M 289 (216); *Davis v Seymour*, 16 M 210 (184).

The payment to the sheriff of the redemption money in United States treasury notes and national bank notes, was sufficient. *Nopson v Horton*, 20 M 268 (239).

A computation, made by the sheriff and the lien-holding creditor, of the amount due on the latter's lien, is not a compliance with the statute requiring such creditor, desiring to redeem, to produce to the sheriff an affidavit of himself or his agent, showing the amount then actually due on his lien. Without production of such affidavit, the attempted redemption is invalid. *Tinkcom v Lewis*, 21 M 132.

A tender to the sheriff who refuses to accept it will not discharge the lien of the certificate of sale. The rights of the parties can neither be waived nor prejudiced by the acts of the sheriff. The tender merely protects the right of the redemptioner, seasonably and properly asserted to have the redemption perfected by application to the certificate holder, or by proceedings against the sheriff to compel him to perform. *Schroeder v Lohrman*, 28 M 75, 9 NW 173.

The mere failure of a sheriff, receiving money on a redemption, to pay same to the party entitled thereto before demand is made on him is not the omission of an official duty, within the meaning of the statute, and in such case an action against the sheriff for the recovery of the money is not barred in three years from the time he received it. *Hall v Swenson*, 65 M 391, 67 NW 1024.

The finding that the owner of the land paid to the sheriff the proper amount to redeem within the time allowed by law is sustained. *McElligott v Millard*, 82 M 251, 84 NW 786.

#### 7. Reciprocal rights

The right to redeem and the right to foreclose are reciprocal. *Holton v Meighen*, 15 M 69 (50); *King v Meighen*, 20 M 264 (237).

Possession in no way affects the right to redeem or foreclose. *Parsons v Naggle*, 23 M 328.

If, without cause to prevent, a right of redemption after it has accrued, is not asserted by action brought for more than ten years, as against a known adverse claim of title to it, becomes barred by lapse of time. *Fisk v Stewart*, 26 M 365, 4 NW 611.

Where the mortgagee has gone into possession as "mortgagee in possession," and so remains (the mortgage being unpaid) until the right of action by the mortgagor to redeem is barred, he becomes vested with the title to the premises. *Rogers v Benton*, 39 M 39, 38 NW 765.

The time within which a mortgagor may bring an action to redeem from mortgagee in possession begins to run from the time the mortgagee goes into possession. The limitation upon suits to redeem, by analogy, is the time within which an action to foreclose may be brought. *Bradley v Norris*, 63 M 156, 65 NW 357.

#### 8. Assignment of certificate as a redemption

A first mortgage having been foreclosed, the holder of the second mortgage bought the certificate of sale, took an assignment of it, but did not act in the way of redemption. His becoming assignee of the certificate did not put him in the position of a redemptioner, and the holder of a third lien, fully complying with the statute, had a right to redeem by simply paying the amount for which the premises were sold, plus interest, and need not pay the second mortgage. *Pamperin v Scanlan*, 28 M 345, 9 NW 868.

Before the expiration of the year for redemption the mortgagee sold and assigned the certificate of sale to the wife of the mortgagor. There was no redemption, and a judgment creditor of the mortgagor has the right to redeem. *Martin v Sprague*, 29 M 53, 11 NW 143; *Sprague v Martin*, 29 M 226, 13 NW 34.

One of two tenants in common "for the purpose of effecting a redemption" and after an "understanding" with his cotenant that he would make such redemption, paid the amount and took an assignment to himself of the certificate. Held, that as to the cotenant, the transaction will be construed as a redemption, and thus not divest the cotenant. *Holterhoff v Mead*, 36 M 42, 29 NW 675.

A purchase by a receiver in his own name of a certificate of sale on foreclosure of the property which was the subject of the receivership will, at the election of interested parties, be deemed a redemption for their benefit, and the

title held in trust for them, subject to his right to be reimbursed of any advances. *Shadewald v White*, 74 M 208, 77 NW 42.

The mere fact that the mortgagee assigns his certificate of foreclosure sale, on being paid the amount of his bid and interest thereon to a third party, at the request of the mortgagor, does not estop the latter from recovering the surplus which the mortgagee retained from the proceeds of the foreclosure sale. *Johnson v Stewart*, 75 M 20, 77 NW 435.

## II. BY MORTGAGOR OR ASSIGN

### 1. Assign defined

The term "assigns" has been defined to include "those to whom the property, or the interest of the mortgagor therein has been assigned." *Gesner v Burdell*, 18 M 497 (444).

It has been defined to include "grantees of the mortgagor, and those acquiring his title otherwise than by descent." *Cuilerier v Brunelle*, 37 M 71, 33 NW 123.

A junior mortgagee is not an assign within the meaning of the statute. *Cuilerier v Brunelle*, 37 M 71, 33 NW 123; *Dreielius v Davis*, 74 M 345, 77 NW 214.

Nor is a purchaser at the foreclosure of a junior mortgage. *Buchanan v Reed*, 43 M 172, 45 NW 11.

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. *Law v Citizens' Bank*, 85 M 411, 89 NW 320.

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 courtesy or one who has the statutory interest superseding dower and courtesy, may redeem as an assign. *Law v Citizens' Bank*, 85 M 411, 89 NW 320.

Where a junior mortgagee made a premature redemption, the purchaser at the sale accepting the money from the sheriff, the transaction amounts to an equitable assignment of the certificate, and upon expiration of the period for redemption, the title to the premises vests in him. *Finegan v Effertz*, 90 M 114, 95 NW 762.

During the time allowed for redemption by owner, the life tenant and the remainderman or either of them could have redeemed, and the estates of plaintiff and her stepchildren were extinguished. *Theilen v Strong*, 184 M 333, 238 NW 678.

The statute which provides that a contract may be terminated by the vendor for default of the purchaser by serving the prescribed notice "upon the purchaser, his personal representative or assigns," does not require such notice to be served on a judgment creditor of the purchaser as he is not an "assign." *Paschke v Adams*, 169 M 445, 211 NW 827.

### 2. By part owner

By agreement between one cotenant and the mortgagee, the latter bid in the property which after the time to redeem had expired was deeded to the said cotenant on payment by him of an amount which would have been required to redeem. Other cotenants are legally entitled to their share in the benefits of the transaction. *Oliver v Hedderly*, 32 M 455, 21 NW 478.

A redemption by one of two joint owners will inure to the benefit of both. *Holterhoff v Mead*, 36 M 42, 29 NW 675.

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. *Buettel v Harmount*, 46 M 481, 49 NW 250.

Where a party owns a separate part, or has some interest in the property, he may redeem the whole tract as owner. Such redemption annuls the sale, but the redemptioner is entitled to a lien in the nature of an equitable mortgage on the part not owned by him, and in an amount comparable to the conditions. *Powers v Sherry*, 115 M 290, 132 NW 210.

**3. By wife**

A wife has such interest in her husband's real estate that she may redeem. *Williams v Stewart*, 25 M 516; *Martin v Sprague*, 29 M 53, 11 NW 143; *Spalti v Blumer*, 56 M 523, 58 NW 156; *Roberts v Meighen*, 74 M 273, 77 NW 139.

The wife redeemed land of her husband and remained in possession. Thereafter they were divorced and the husband deeded the property to defendant Thele. Held, plaintiff wife had a right to redeem; such redemption annulled the sale; and Thele owns the land subject to a lien thereon in favor of plaintiff for the amount she paid, less value of use of the property while in her possession. *Kopp v Thiele*, 104 M 267, 116 NW 472; *Slagle v Slagle*, 187 M 5, 244 NW 79.

**4. Time to redeem; extension**

The time to redeem stated in the certificate of sale does not control in case of conflict with the statute. *Carroll v Rossiter*, 10 M 174 (141).

Status and effect of agreements between the parties as to an extension of time to redeem. *Williams v Stewart*, 25 M 516; *Steele v Bond*, 28 M 267, 9 NW 772, 32 M 14, 18 NW 830; *Reynolds v St. P. Loan*, 46 M 84, 48 NW 458.

If the last day falls on Sunday, redemption may be made on Monday. *Bovey v Tucker*, 48 M 223, 50 NW 1038.

A court cannot extend the period of redemption. *State ex rel v Kerr*, 51 M 417, 53 NW 719.

The right to redeem expires absolutely at the expiration of the 12 months and cannot be revived. *Gates v Ege*, 57 M 465, 59 NW 495.

A payment to the sheriff through a third party is sufficient although the sheriff did not receive the money until after the period for redemption had expired. *McElligott v Millard*, 82 M 251, 84 NW 786.

In an action to enforce an agreement to extend the time in which to redeem from a foreclosure sale, the evidence was sufficient to support findings in favor of defendants. *Grahek v Skala*, 172 M 422, 215 NW 839.

In an action for damage on account of premature foreclosure, which could have been prevented had plaintiff so elected, the measure is not the value of the property in excess of the debt, but only the value of the use to the extent plaintiff has been deprived. *Bowen v Bankers Life Co.* 185 M 35, 239 NW 774.

In the instant case, there was no implied contract to further extend the period of redemption. *Van Dyke v Kunz*, 198 M 578, 270 NW 608.

Right of redemption is a right favored by law and statutes are liberally construed in favor of the redemptioner. It is the duty of the court within limits of the moratorium act, so to construe it as to avoid forfeitures. Within a year after sale the mortgagor or his successor in title may redeem under section 580.23; and if he fails to redeem, then a creditor, if he file his statutory notice of intention, may redeem under section 580.24. *Tomasko v Cotton*, 200 M 69, 273 NW 628.

In determining the consequence of a disregard of a statutory provision as to time, a court must seek to ascertain the legislative intent. It will consider the language of the statute, the subject matter, the importance of the provision and the object intended to be secured. If the provision does not go to the essence of the thing to be done, or if there are no negative words restricting the doing of an act after the time fixed by statute, the provision will be held mandatory. *Rambeck v LaBree*, 156 M 310, 194 NW 643.

The trial court's findings that the parties did not abandon the foreclosure, or continue or extend the mortgage, or waive any right acquired by the foreclosure, are sustained. *Investors' Synd. v Horrigan*, 186 M 599, 244 NW 65.

**5. Amount required to redeem**

A mortgagor has a right to redeem from a mortgage by paying the mortgage debt and interest and costs, and he cannot be required as a condition of such redemption, to pay any other debt due from him to the mortgagee. *Bacon v Cottrill*, 13 M 194 (183); *Weller v Summers*, 82 M 307, 84 NW 1022.



Redemption cannot be made by a tender of less than the amount for which the property was sold, with interest, even where the foreclosure was for more than was actually due on the mortgage. *Dickerson v Hayes*, 26 M 100, 1 NW 834.

Where a mortgage by its terms draws five and one-half per cent interest, and is foreclosed by advertisement, redemption may be made by paying the sum for which the property was sold, together with interest at seven per cent from the date of the sale. *Evans v Rhode Island Trust*, 67 M 160, 69 NW 715, 1069.

The omission from the sheriff's certificate of redemption of a statement of the amount claimed to be due as provided in General Statutes 1913, Section 8149 (section 580.26), does not invalidate the redemption as to a junior creditor, if the affidavit required by General Statutes 1913, Section 8148 (section 580.25), is on file in the office of the register of deeds when the junior creditor redeems. *Rambeck v La Bree*, 156 M 310, 194 NW 643.

### III. GENERALIY

Who is mortgagor? D by virtue of his quitclaim deed had no right of redemption. Redemption must be made by B or those claiming under him. *Gesner v Burdell*, 18 M 497 (444).

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. *Martin v Sprague*, 29 M 53, 11 NW 143.

Non-redemption within the statutory time extinguishes all the estate and interest of the mortgagor and consequently of all persons claiming under him. *Martin v Sprague*, 29 M 53, 11 NW 143; *Jacoby v Crowe*, 36 M 93, 30 NW 441.

Foreclosure by advertisement is a proceeding in pais, and under power, and the courts have no power to relieve against statutory forfeitures. *State ex rel v Kerr*, 51 M 420, 53 NW 719.

In the instant case a crop not harvested until a short time after expiration of year for redemption held the property of the tenant and the mortgagor. *Schuchard v St. Anthony & Dakota*, 176 M 37, 222 NW 292.

After foreclosure sale the rights of the parties are determined exclusively by statute, the remedy on the mortgage as security being exhausted by the foreclosure. *Gardner v Prindle*, 185 M 147, 240 NW 351.

Effect of foreclosure upon subsequent lease and lessee. 21 MLR 611.

#### 580.24 REDEMPTION BY CREDITOR.

HISTORY. 1878 c. 53 s. 16; G.S. 1878 c. 81 s. 16; G.S. 1894 s. 6044; R.L. 1905 s. 4481; G.S. 1913 s. 8147; G.S. 1923 s. 9627; M.S. 1927 s. 9627.

1. Generally
2. Who may redeem as creditors
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4. Tacking
5. Right statutory
6. Construction of statute
7. Statute must be substantially followed
8. What law governs
9. Five-day period
10. Order among successive creditors
11. Extension of time to redeem
12. When right accrues
13. A vested right
14. Attacking creditor's lien
15. Waiver of irregularities
16. A purchaser for value
17. Effect of non-redemption

### 1. Generally

The redemption is made from the purchaser as purchaser, not as assignee of the mortgage. It is a redemption of the land sold from the sale and not of the land mortgaged from the mortgage. *Tinkcom v Lewis*, 21 M 132.

The creditor's right of redemption is the right to buy the purchaser's interest at the price paid by him, with interest from date of the sale. *Tinkcom v Lewis*, 21 M 132.

Where two parcels covered by the same mortgage are sold separately to the mortgagee at a separate price for each, a junior mortgagee of one of the parcels can redeem from the sale that parcel only which is embraced in his mortgage. *Tinkcom v Lewis*, 21 M 132.

The general object of this statute 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 the sale for the benefit of 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. *Pamperin v Scanlan*, 28 M 345, 9 NW 868; *Martin v Sprague*, 29 M 53, 11 NW 143; *Sprague v Martin*, 29 M 226, 13 NW 34.

Where a junior redemptioner seasonably redeems from a senior creditor, it does not affect the validity of the redemption that the lien of the senior redemptioner was invalid. *Todd v Johnson*, 56 M 60, 57 NW 320.

Redemption of the husband's land by the wife annulled the sale. After being divorced the husband sold the land to Thele, who now owns same subject to an equitable lien of the wife for the amount she paid in redemption. *Kopp v Thele*, 104 M 267, 116 NW 472.

If the attempt of a judgment creditor to redeem land sold on foreclosure is ineffectual, another judgment creditor whose lien is subsequent may redeem in the manner prescribed by the statutes. *Leland v Herberg*, 156 M 30, 194 NW 93.

The mechanic's lien redemptioner did not sue under the lien decree, and if the property he gets is less in value than the amount of his judgment on which he bases his redemption, and the amount he pays to affect it, he may recover the difference. *Crown Iron Works v Melin*, 159 M 198, 198 NW 462.

Where a mortgagor fails to redeem from the foreclosure sale, and the holder of a second mortgage redeems therefrom as a creditor, and the purchaser acquiesces, the mortgagor cannot dispute the validity of the redemption. *Johnson v Melgus*, 163 M 315, 203 NW 983.

A tenant in common is at liberty to purchase a mortgage on the common property without assuming a duty to his cotenants to redeem under it from a sale under a prior mortgage. After the period for redemption has expired he may then purchase from the purchaser at the foreclosure, and the title vests in him as his own and without any legal duty to his former cotenants. *Fuller v Dennistoun*, 164 M 165, 204 NW 958.

By giving notice of its intention to redeem, the bank, creditor and appellant, did not waive its right to question the validity of the foreclosure. *Hudson v Upper Mich. Co.* 165 M 172, 206 NW 44.

Where a junior creditor redeems, the court will not inquire into the amount or validity of the prior lien. The marshaling of liens is according to priority of the time of recording. The junior redemptioner must pay the amount shown by the record regardless of alleged fraud in the claim of the senior creditor. *Betcher v Ebert*, 169 M 341, 211 NW 323.

The evidence sustains the finding that there was an agreement between the mortgagor and a junior lienholder by which said lienholder was to make redemption, and lease the land to the mortgagor, which was done. That by doing this other lienholders were entirely eliminated, and that redemptioner was attorney for the mortgagor is immaterial. *Cole v Hughes*, 174 M 180, 218 NW 889.

Plaintiff, holder of a second mortgage, could sue for breach of the condition of bond against mechanic's liens and recover damages for impairment of his security without redeeming from the foreclosure of the first mortgage. *Strimling v Union Indemnity*, 176 M 26, 222 NW 512.

The purchaser at the sale having failed to file an affidavit as to taxes paid, they did not become part of the sum to be paid in making redemption. *Limnell v Limnell*, 176 M 397, 223 NW 609.

Statutory provision prohibiting institution or maintenance of foreclosure proceedings after mortgagor's filing of petition for agricultural extension, does not extend or toll period of redemption, where mortgagors filed petition more than four months after the foreclosure sale. *In re Klein*, 9 F. Supp. 60; *In re Stacy*, 9 F. Supp. 65.

Where the holder of a second mortgage redeems from a sale under the first mortgage, a holder of a mortgage junior to the second cannot redeem except by tendering an amount sufficient to cover the claim of the second mortgage. 1936 OAG 132, June 20, 1935 (390c-14).

## 2. Who may redeem as creditors

The following may redeem as a creditor: A creditor acquiring a lien pending the time of redemption. *Watkins v Hackett*, 20 M 106 (92);

A junior mortgagee, *Nopson v Horton*, 20 M 268 (239); *Tinkcom v Lewis*, 21 M 132; *Cuillerier v Brunelle*, 37 M 71, 33 NW 123; *Hoover v Johnson*, 47 M 434, 50 NW 475; *Bovey v Tucker*, 48 M 223, 50 NW 1038; *Finnegan v Effertz*, 90 M 114, 95 NW 762;

A purchaser at a foreclosure sale of a junior mortgage. *Tinkcom v Lewis*, 21 M 132; *Buchanan v Reid*, 43 M 172, 45 NW 11;

A creditor having a lien on part of the land sold. *Tinkcom v Lewis*, 21 M 132; *Willis v Jelineck*, 27 M 18, 6 NW 373; *Martin v Sprague*, 29 M 53, 11 NW 143; *O'Brien v Krenz*, 36 M 136, 30 NW 458;

A judgment creditor, *Willis v Jelineck*, 27 M 18, 6 NW 373; *Pamperin v Scanlan*, 28 M 345, 9 NW 868; *Martin v Sprague*, 29 M 53, 11 NW 143; *Sprague v Martin*, 29 M 226, 13 NW 34; *Herrick v Marotte*, 30 M 161, 14 NW 795; *O'Brien v Krenz*, 36 M 136, 30 NW 458; *Willard v Finnegan*, 42 M 476, 44 NW 985; *Atwater v Manchester*, 45 M 341, 48 NW 187; *Lowry v Akers*, 50 M 508, 52 NW 922; *Parker v St. Martin*, 53 M 1, 55 NW 113; *Todd v Johnson*, 56 M 60, 57 NW 320; *Swanson v Realization Co.* 70 M 380, 73 NW 165; *Hughes v Olson*, 74 M 237, 77 NW 42; *Clark v Butts*, 78 M 373, 81 NW 11;

A creditor of a grantee of the mortgagor. *Hospes v Sanborn*, 28 M 48, 8 NW 905.

It is not necessary that a creditor 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. *Hospes v Sanborn*, 28 M 48, 8 NW 905; *Buchanan v Reid*, 43 M 172, 45 NW 11.

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. *Whitney v Burd*, 29 M 203, 12 NW 530; *Nelson v Rogers*, 65 M 246, 68 NW 18.

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. *Whitney v Burd*, 29 M 203, 12 NW 530; *Nelson v Rogers*, 65 M 246, 68 NW 18.

Plaintiff, an attaching creditor, having complied with all requirements for redemption, has a right to be placed in statu quo, on a showing that the bond given in release of his attachment was illegally purposed. *Kling v Childs*, 30 M 366, 15 NW 673.

An attaching creditor on a contract express or implied has a right to redeem. *Atwater v Manchester Bank*, 45 M 341, 48 NW 187.

An assignee of a junior mortgage may redeem. *Bovey v Tucker*, 48 M 223, 50 NW 1038; *Darelius v Davis*, 74 M 345, 77 NW 214.

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An assignee of a judgment against the mortgagor may redeem although the assignment is not filed under General Statutes 1894, Section 5431. *Swanson v Realization Co.* 70 M 380, 73 NW 165.

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. *Scheibel v Anderson*, 77 M 54, 79 NW 594.

A junior mortgagee in a mortgage on which the registry tax has not been paid cannot redeem. *Orr v Sutton*, 119 M 193, 137 NW 973.

In a divorce action the court may decree the payment of support money from the husband and make the same a lien upon specified real estate. This created a judgment on which the divorced wife, for herself and children, could redeem from a foreclosure. *Limnell v Limnell*, 176 M 393, 223 NW 609.

During the year allowed by statute the life tenant and the remaindermen could have redeemed. Their estates having been extinguished, the defendant, a creditor of the mortgagor's assignee, a subsequent owner had a right to redeem. *Thielen v Strong*, 184 M 333, 238 NW 678.

Just before the year for redemption expired, defendant and her attorney, for the purpose of excluding the husband, against whom divorce proceedings were pending, conspired to have the attorney, on a judgment confessed by her for fees, redeem from the foreclosure. Held, the redemptioner held the property in trust for husband and wife subject to his lien for money paid in redemption. *Slagle v Slagle*, 187 M 5, 244 NW 79.

The moratorium act is remedial, and within the limits of the act the court should avoid forfeitures; so that, as to a subsequent lien claimant who has placed himself in line of redemption, failure on the part of the mortgage debtor, in a moratorium proceeding instituted by him against the certificate holder alone, to notify the holder of such claim, leaves such claimant free to act pursuant to the statute which gives him right of redemption. *Tomasko v Cotton*, 200 M 69, 273 NW 628.

### 3. Notice of intention

If the notice is recorded it is immaterial that it is not filed. *Willis v Jelineck*, 27 M 18, 6 NW 373.

An assignee of a lien may foreclose under a notice filed by his assignor. *Bovey v Tucker*, 48 M 223, 50 NW 1038.

Where foreclosure is by action, the notice must be filed with the clerk of court. *Bovey v Tucker*, 48 M 223, 50 NW 1038.

Defects in a notice are waived if the purchaser accepts the redemption money. *Todd v Johnson*, 50 M 310, 52 NW 864; *Clark v Butts*, 73 M 361, 76 NW 199.

The notice is not a part of the redemptioner's muniments of title. *Todd v Johnson*, 50 M 310, 52 NW 864.

Fraudulent notices may constitute a cloud on title removable by action. *Distinguishing Brown v Tucker*, 48 M 223, 50 NW 1038. *New England Mutual v Capehart*, 63 M 120, 65 NW 258.

A notice filed before the creditor actually acquires his lien is ineffectual although he subsequently and during the year acquires the lien described. *Maurin v Carnes*, 71 M 308, 74 NW 139; *Brady v Gilman*, 96 M 234, 104 NW 897.

A notice of intention to redeem as "a judgment creditor" does not authorize a redemption by an owner. *Bagley v McCarthy Bros.* 95 M 286, 104 NW 7.

### 4. Tacking

A 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. *Pamperin v Scanlan*, 28 M 345, 9 NW 868; *Parke v Hush*, 29 M 434, 13 NW 668; *Klingle v Boelter*, 43 M 172, 45 NW 11; *Ritchie v Ege*, 58 M 291, 59 NW 1029; *Bagley v McCarthy*, 95 M 286, 104 NW 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. *Ritchie v Ege*, 58 M 291, 59 NW 1020; *Moore v Penney*, 141 M 456, 170 NW 599.

The purchaser may pay taxes and have an additional lien thereon to be tacked to the amount of the sheriff's certificate and included in the amount required to make redemption on the part of a subsequent lienholder; but in order so to do he must file the affidavit required by section 582.03. *Tomasko v Cotton*, 200 M 69, 273 NW 628.

#### 5. Right statutory

The right of a creditor to redeem is purely statutory. *Tinkcom v Lewis*, 21 M 132; *Pamperin v Scanlan*, 28 M 345, 9 NW 868; *Cuilerier v Brunelle*, 37 M 71, 33 NW 123; *State ex rel v Kerr*, 51 M 417, 53 NW 719.

But the practice is to be construed as equity practice. *Pamperin v Scanlan*, 28 M 345, 9 NW 868; *Nelson v Rogers*, 65 M 246, 68 NW 18.

#### 6. Construction of statute

The statute is remedial and to be construed liberally in favor of the mortgagor and the redeeming creditors. *Tinkcom v Lewis*, 21 M 132; *Martin v Sprague*, 29 M 53, 11 NW 143.

It is to be construed with reference to its general purpose. *Pamperin v Scanlan*, 28 M 345, 9 NW 868.

It is to be construed similarly to former equity practice. *Pamperin v Scanlan*, 28 M 345, 9 NW 868; *Nelson v Rogers*, 65 M 246, 68 NW 18.

#### 7. Statute must be substantially followed

There must be a substantial compliance with the requirements of the statute. *Tinkcom v Lewis*, 21 M 132; *Cuilerier v Brunelle*, 37 M 71, 33 NW 123; *Hoover v Johnson*, 47 M 434, 50 NW 475; *State ex rel v Kerr*, 51 M 417, 53 NW 719.

Mere formal defects may be overlooked. *Tinkcom v Lewis*, 21 M 132.

The purchase of the certificate by the second mortgage holder was not a compliance with the statute, and accordingly a third lienholder may redeem without payment to the second mortgagee. *Pamperin v Scanlan*, 28 M 348, 9 NW 868.

Notwithstanding the failure to comply with the statute regarding assignments of the judgment on which redemption was made, the redemption was valid at the time it was made. *Swanson v Realization Co.* 70 M 380, 73 NW 165.

The action of the trial court in enjoining the mortgagee in the second mortgage from redeeming, is sustained. *Burns v Burns*, 124 M 176, 144 NW 761.

#### 8. What law governs

The law of the date of the execution of the mortgage governs. *Heyward v Judd*, 4 M 483 (375); *Goenen v Schroeder*, 8 M 387 (344); *Carroll v Rossiter*, 10 M 174 (141); *Willis v Jelineck*, 27 M 18, 6 NW 373; *Hillebert v Porter*, 28 M 496, 11 NW 84; *O'Brien v Krenz*, 36 M 136, 30 NW 458.

#### 9. Five-day period

The year to redeem from the foreclosure sale under the second mortgage expired 30 days before the year to redeem from the foreclosure sale under the first mortgage. No redemption was made during the year. Eighteen subsequent creditors filed notices of intention to redeem from each sale, so that each being allowed five days extended the time for the 18th creditor to 90 days after the sale. The other 17 failed to redeem from the earlier sale and on the 90th day after that sale, the 18th creditor redeemed from both sales. As the liens of the other 17 were cut off they had no further rights of redemption. While the redemption from the second sale was premature, the 18th creditor did not interfere with the

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rights of anyone else entitled to redeem and his redemption was legal. *Conn. Mutual v King*, 72 M 287, 75 NW 376; 80 M 76, 82 NW 1103.

## 10. Order among successive creditors

The "senior creditor" means the senior creditor who redeems. *Pamperin v Scanlan*, 28 M 345, 9 NW 868.

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. *Whitny v Burd*, 29 M 203, 12 NW 530.

A purchaser at the sale cannot object that a creditor redeems out of the statutory order or prematurely. *Conn. Mut. v King*, 72 M 287, 75 NW 376, 80 M 76, 82 NW 1103.

Priority of liens is determined by the time of record, without reference to estates in land, or any part thereof, owned by mortgagors. *Bartleson v Munson*, 105 M 348, 117 NW 502; *Lowe v Reirson*, 201 M 280, 276 NW 224.

## 11. Extension of time to redeem

The purported agreement by purchaser to re-sell to the mortgagor cannot be construed as an agreement to extend the period of redemption. *Williams v Stewart*, 25 M 516.

If the acts of the purchaser relied on by the debtor constituting such waiver are equivalent to an estoppel in pais, he is bound by them and a reasonable time after notice must be allowed the debtor in which to redeem. *Tice v Russell*, 43 M 66, 44 NW 886.

The time cannot be extended to await the determination of a suit in equity for an accounting. *Hoover v Johnson*, 47 M 434, 50 NW 475.

A district court cannot, in the exercise of its discretionary powers, extend or enlarge the period of redemption. *State ex rel v Kerr*, 51 M 417, 53 NW 719.

A creditor's right to redeem cannot be prejudiced by an agreement between the mortgagor and the purchaser at the sale. *Swanson v Realization Co.* 70 M 380, 73 NW 165; *Phelps v Western Realty*, 89 M 319, 94 NW 1085, 1135.

## 12. 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. *Pamperin v Scanlan*, 28 M 345, 9 NW 868; *Sprague v Martin*, 29 M 226, 13 NW 34; *Gates v Ege*, 57 M 465, 59 NW 495.

The purchaser may waive a premature redemption by a creditor. *Sprandel v Haude*, 54 M 308, 56 NW 34; *Finnegan v Effertz*, 90 M 114, 95 NW 762.

Where several mortgages, executed on the same day on the same land, were recorded at the same hour and each received document numbers in the register's office, it must be presumed in the absence of any showing to the contrary, that they take priority in the order in which they are numbered. *Conn. Mutual v King*, 72 M 287, 75 NW 376.

## 13. A vested right

The right of redemption given to a senior creditor when once vested, becomes a property right, which cannot be divested against the consent of the creditor without due process of law. *Willis v Jellineck*, 27 M 18, 6 NW 373; *O'Brien v Krenz*, 36 M 136, 30 NW 458; *Lowry v Mayo*, 41 M 388, 43 NW 78.

## 14. Attacking creditor's lien

Cases in which the creditor's alleged lien has been attacked. *Martin v Sprague*, 29 M 53, 11 NW 143; *Witland v Finnegan*, 42 M 476, 44 NW 985; *Atwater v Man-*

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chester Bank, 45 M 341, 48 NW 187; Bovey v Tucker, 48 M 223, 50 NW 1038; Parker v St. Martin, 53 M 1, 55 NW 113; Todd v Johnson, 56 M 60, 57 NW 320; New England Mutual v Capehart, 63 M 120, 65 NW 258; Swanson v Realization Co. 70 M 380, 73 NW 165; Hughes v Olson, 74 M 237, 77 NW 42; Roberts v Meighen, 74 M 273, 77 NW 139.

### 15. Waiver of irregularities

The sheriff cannot waive defects as against the purchaser. *Tinkcom v Lewis*, 21 M 132.

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. *Tinkcom v Lewis*, 21 M 132; *Todd v Johnson*, 50 M 310, 52 NW 864; *Clark v Butts*, 73 M 361, 76 NW 199; *Grant v Bibb*, 129 M 312, 152 NW 728.

The objection that a redemption was prematurely made may be waived. *Sprandel v Houde*, 54 M 308, 56 NW 34; *Finnegan v Effertz*, 90 M 114, 95 NW 762.

The 18th creditor took a conveyance from the holder of the sheriff's certificate of the second mortgage foreclosure two days after the year to redeem from that sale expired, and subsequently redeemed from himself. There was no merger of title to prevent such redemption. *Connecticut Mut. v King*, 72 M 287, 75 NW 376.

The party holding the rights acquired at foreclosure sale can take no advantage of the fact that a subsequent creditor redeems within the time open to a prior lienholder. *Connecticut Mut. v King*, 80 M 76, 82 NW 1103.

### 16. A purchaser for value

A creditor redeeming is a purchaser for a valuable consideration. *Martin v Baldwin*, 30 M 537, 16 NW 449; *Ahern v Freeman*, 46 M 156, 48 NW 677; *White v Leeds*, 72 M 352, 75 NW 761, 595.

As a purchaser for value a redeeming creditor is protected from a resulting trust of which he has no notice. *Martin v Baldwin*, 30 M 537, 16 NW 449.

The rule that possession is notice applies to one redeeming from a foreclosure sale of land which is in actual possession of a person other than the mortgagor. *Niles v Cooper*, 98 M 39, 107 NW 744.

### 17. Effect of non-redemption

Failure to redeem on a sale made from 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 the second lien, whether made before or after that on the 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. *Bartleson v Thompson*, 30 M 161, 14 NW 795; *Hooper v Henry*, 31 M 264, 17 NW 476; *Lowry v Ekers*, 50 M 508, 52 NW 922; *Sprandel v Houde*, 54 M 308, 56 NW 34; *Conn. Mut. v King*, 72 M 287, 75 NW 376; *White v Rathbone*, 73 M 237, 75 NW 1046; *Bagley v McCarthy*, 95 M 286, 104 NW 7.

Where plaintiff foreclosed his mortgage and purchased for an amount which left a surplus, and afterward plaintiff issued an 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. *McCaffery v Burkhardt*, 104 M 340, 116 NW 645.

### 580.25 REDEMPTION HOW MADE.

**HISTORY.** 1878 c. 53 s. 14; G.S. 1878 c. 81 s. 14; Ex. 1881 c. 3 s. 1; R.L. 1905 s. 4482; G.S. 1913 s. 8148; G.S. 1923 s. 9628; M.S. 1927 s. 9628.

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MORTGAGE FORECLOSURE BY ADVERTISEMENT 580.25

1. Proof of right to redeem
2. Amount necessary
3. Tender
4. Filing
5. Payment

## 1. Proof of right to redeem

No provision is made for formal notice of redemption. A party merely redeems and files with the sheriff the papers required by statute. *Warren v Fish*, 7 M 432 (347).

The object of the statute is to furnish evidence to the officer or purchaser that the party purposing 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 paid to a previous one. The statute is liberally construed in favor of the redemptioner. *Williams v Lash*, 8 M 496 (441); *Tinkcom v Lewis*, 21 M 132; *Pamperin v Scanlan*, 28 M 345, 9 NW 868.

The redemptioner need not produce all the deeds constituting his chain of title from the mortgagor. *Nopson v Horton*, 20 M 268 (239).

The production of the original instrument evidencing the lien, with the certificate of record endorsed thereon, is a sufficient compliance with the statute. *Tinkcom v Lewis*, 21 M 132; *Sardeson v Menage*, 41 M 314, 43 NW 66; *Hunter v Manseau*, 91 M 124, 97 NW 651.

An affidavit of the amount due is indispensable. *Tinkcom v Lewis*, 21 M 132.

Where the 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. *Wilson v Hayes*, 40 M 531, 42 NW 467.

The refusal of the clerk to recognize a party's right to redeem will not be allowed to prejudice him. *Abraham v Halloway*, 41 M 156, 42 NW 867.

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. *Sardeson v Menage*, 41 M 314, 43 NW 66.

The redemption papers are not a part of the redemptioner's muniments of title. *Todd v Johnson*, 50 M 310, 52 NW 864.

The sheriff is not required to notify the mortgagor of a redemption. *Hall v Swensen*, 65 M 391, 67 NW 1024.

The failure to file the affidavit of the amount due, or to produce the papers required by statute, is waived by accepting the redemption money. *Clark v Butts*, 73 M 361, 76 NW 199.

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. *Hunter v Maseau*, 91 M 124, 97 NW 651.

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. *Lightbody v Lammers*, 98 M 203, 108 NW 846.

If the documents to which General Statutes 1913, Section 7148, (section 580.25), refer are on file when a junior creditor redeems, he cannot question the validity of a prior redemption solely because the filing was not made within the time prescribed by the statute. *Rambeck v LaBree*, 156 M 310, 194 NW 643.

As against the owner of a third mortgage on land, the failure of the owner of a second mortgage to produce and file the affidavit required by section 580.25, invalidates an attempted redemption from the foreclosure sale under the first mortgage. *Taber v Rathbun*, 168 M 370, 210 NW 95.



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Where the decree of divorce made the payment of specified sums a lien on specified real estate, that judgment gave the divorced wife the right to redeem, and her affidavit was proper. *Limnell v Limnell*, 176 M 393, 223 NW 609.

A redemption by a junior mortgagee operates as an assignment of the rights of the purchaser at a real estate foreclosure sale by advertisement, and the redemptioner is subrogated to such rights. The redemptioner has no greater rights than would one who took an assignment of the sheriff's certificate of sale. *Des Moines Bank v Danicourt*, 185 M 435, 241 NW 393.

When upon request by plaintiff (who had an interest in two of the three tracts) for a statement of the amount due on the prior encumbrance defendant demanded payment of the full amount, plus, and plaintiff tendered the amount so demanded, it became subrogated to all rights of the defendant in the prior encumbrance. *First Nat'l v Schunk*, 201 M 363, 276 NW 290.

The right of redemption from a real estate mortgage foreclosure sale is given by statute and must be exercised in strict compliance with such statute. *Krahmer v Koch*, 216 M 423, 13 NW(2d) 370.

## 2. Amount necessary

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. *Bennett v Healey*, 6 M 240 (158).

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. *Horton v Moffitt*, 14 M 289 (216); *Davis v Seymour*, 16 M 210 (184); *Gesner v Burdell*, 18 M 497 (444); *Tinkcom v Lewis*, 21 M 132; *Schroeder v Lahrman*, 28 M 75, 9 NW 173; *In re Grundysen*, 53 M 346, 55 NW 557; *Hall v Swensen*, 65 M 391, 67 NW 1024.

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. *Pamperin v Scanlan*, 28 M 345, 9 NW 868.

Where the redemptioner pays to the sheriff a gross sum for the redemption and sheriff 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. *Bovey v Tucker*, 48 M 223, 50 NW 1038.

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. *Bartleson v Munson*, 105 M 348, 117 NW 512.

The right of lien creditors to redeem is statutory and must be exercised in accordance with the statute; and each redeeming creditor must pay the amount which the creditor from whom he redeems paid, plus the amount of such redeeming creditor's lien. *Betcher v Ebert*, 169 M 337, 211 NW 323.

## 3. Tender

Payment or tender to the deputy sheriff is sufficient. *Williams v Lash*, 8 M 496 (441); *Willis v Jelineck*, 27 M 18, 6 NW 373.

The sheriff was the proper officer to whom tender should be made. *Thompson v Foster*, 21 M 319.

A redemption cannot be made by a tender of less than the amount for which the property was sold, with interest, even where the foreclosure was for more than was due on the mortgage. *Dickerson v Hayes*, 26 M 100, 1 NW 834.

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A mere tender to the sheriff by a redemptioner of the amount necessary to redeem, and a refusal of the sheriff to receive it, will not discharge the lien of the holder of the certificate of sale. The effect of the tender and refusal is to preserve the right of the redemptioner to have the redemption perfected by other means. *Schroeder v Lohrman*, 28 M 75, 9 NW 173; *Abraham v Holloway*, 41 M 156, 42 NW 867.

A tender must be kept good in order to be effectual. *Dunn v Hunt*, 63 M 484, 65 NW 948, 76 M 196, 78 NW 1110.

### 4. Filing

Prior to the enactment of Ex. Laws 1881, Chapter 3, there was no provision for recording or filing the redemption papers. *Tinkcom v Lewis*, 21 M 132; *Todd v Johnson*, 50 M 310, 52 NW 864.

The statute is intended for the protection of junior redemptioners and they alone, if anyone, can take advantage of a non-compliance with its provisions. *Wilson v Hayes*, 40 M 531, 42 NW 467; *Todd v Johnson*, 50 M 310, 52 NW 864.

Failure to file redemption papers within 24 hours, does not invalidate redemption, unless impairing rights of subsequent redemptioners. *Rambeck v LaBree*, 156 M 310, 194 NW 643.

### 5. Payment

If the sheriff accepts without objection treasury or national bank notes, or a check on a bank, the payment is good. *Nopson v Horton*, 20 M 268 (239); *Sardeson v Menage*, 41 M 314, 43 NW 66.

#### 580.26 CERTIFICATE OF REDEMPTION; RECORD.

**HISTORY.** 1878 c. 53 s. 15; G.S. 1878 c. 81 s. 15; G.S. 1894 s. 6043; 1901 c. 38; R.L. 1905 s. 4483; G.S. 1913 s. 8149; G.S. 1923 s. 9629; M.S. 1927 s. 9629.

A certificate issued to one not entitled to redeem is a nullity. *Gesner v Burdell*, 18 M 497 (444).

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. *Willis v Jelineck*, 27 M 18, 6 NW 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. *Cooper v Finke*, 38 M 2, 35 NW 469.

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. *Todd v Johnson*, 50 M 310, 52 NW 864.

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. *Todd v Johnson*, 50 M 310, 52 NW 864.

The sheriff may execute the certificate although the payment is made to the party from whom redemption is made. *Sprandel v Houde*, 54 M 308, 56 NW 34.

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. *Coffman v Christensen*, 102 M 460, 113 NW 1064.

The omission from the sheriff's certificate of a statement of the amount claimed to be due on a redemptioner's lien as provided by section 580.26, does not invalidate the redemption as to a junior creditor, if the affidavit required by section 580.25 is on file in the office of the register of deeds when the junior creditor redeems. *Rambeck v LaBree*, 156 M 310, 194 NW 643.

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As against the owner of a third mortgage on land, the failure of the owner of a second mortgage to produce and file the affidavit required by section 580.25 invalidates an attempted redemption from the foreclosure sale under a first mortgage. *Taber v Rathbun*, 168 M 370, 210 NW 95.

Failure to record the redemption certificate within four days rendered it void as to the good faith redemption from the sheriff. Drew, the holder of the certificate, accepted redemption money from the owner, and when the owner failed to file his certificate, Drew received through the sheriff the redemption money of the junior redemptioner. The owner cannot claim the money he rightfully paid to Drew, but he is entitled to recover the money Drew received from the junior redemptioner. *Tesch v Drew*, 177 M 563, 225 NW 815.

Protection of an interest in real property acquired by a purchaser in good faith at an execution sale; defects in the title of the judgment debtor. 24 MLR 807.

### 580.27 EFFECT OF REDEMPTION

HISTORY. 1878 c. 53 s. 15; G.S. 1878 c. 81 s. 15; G.S. 1894 s. 6043; 1901 c. 38; R.L. 1905 s. 4484; G.S. 1913 s. 8150; G.S. 1923 s. 9630; M.S. 1927 s. 9630.

1. Redemption by owner
2. Redemption by creditor

#### 1. Redemption by owner

A sale from which a redemption is made does not affect the lien of the mortgage for other instalments of the mortgage debt. *Daniels v Smith*, 4 M 172 (117); *Standish v Vosberg*, 27 M 175, 6 NW 489; *Herber v Christopherson*, 30 M 395, 15 NW 676.

A redemption by the owner, his heirs, executors, administrator or assigns, annuls the sale, leaving the property in the same condition as if the mortgage had never been made. *Gesner v Burdell*, 18 M 497 (444); *McArthur v Martin*, 23 M 74; *Williams v Stewart*, 25 M 516; *Martin v Sprague*, 29 M 53, 11 NW 143; *Cuilerier v Brunelle*, 37 M 71, 33 NW 123.

A redemption by a part owner annuls the sale as to the whole tract. *Buettel v Harmount*, 46 M 481, 49 NW 250.

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. *Clark v Butts*, 78 M 373; 81 NW 11.

Though the land stood in the name of the husband, the wife could lawfully redeem but as the redemption annulled the sale the husband after divorce could deed the land to a third party, and said third party owns the land subject to the wife's lien for the money paid on redemption. *Kopp v Thele*, 104 M 267, 116 NW 472.

Kirsch and McGregor, owners in common, gave a mortgage to Scandia Bank. Later, McGregor gave a mortgage to the same bank on his half. Kirsch paid his half of the joint mortgage, and later when the bank foreclosed he redeemed. By this redemption he obtained an equitable mortgage on McGregor's one-half interest which would be prior to the bank's mortgage on McGregor's half. *Kirsch v Scandia Bank*, 160 M 269, 199 NW 881.

If a life tenant redeems, he will hold for the joint benefit of himself and the remainderman, the latter being required to contribute his share of the amount required for redemption, the life tenant being chargeable with an amount equal to the present worth of an annuity equal to the annual interest on the mortgage debt for the period of his own expectancy. *In re Lee*, 171 M 182, 213 NW 736; *Engel v Swenson*, 191 M 324, 254 NW 2.

Under divorce proceedings the wife was given possession of an apartment building with the right to rentals. She did not pay the interest and a mortgage was foreclosed. Just prior to the expiration of the year for redemption, she confessed judgment to her attorney for his fees, and he redeemed. Held, the purchaser

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was trustee for husband and wife with a prior lien to amount paid for redemption. *Slagle v Slagle*, 187 M 5, 244 NW 79.

Covenants of title in mortgages. 12 MLR 55.

### 2. Redemption by creditor

Redemption by a creditor operates as an assignment of the right of the purchaser. *Watkins v Hackett*, 20 M 106 (92); *Pamperin v Scanlan*, 28 M 345, 9 NW 868; *Abraham v Holloway*, 41 M 156, 42 NW 867; *Miller v Fasler*, 42 M 366, 44 NW 256.

The redemption 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 the intervening redemption liens and may enforce them against the land for his protection and reimbursement. The lien on which the 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. *Tinkcom v Lewis*, 21 M 132; *Lowry v Akers*, 50 M 508, 52 NW 922.

The redemptioner is subrogated to the rights of the purchaser. *McArthur v Martin*, 23 M 74; *Willis v Jelineck*, 27 M 18, 6 NW 373; *Martin v Sprague*, 29 M 53, 11 NW 143; *O'Brien v Krenz*, 36 M 136, 30 NW 458; *Swanson v Realization Co.* 70 M 380, 73 NW 165.

The redemptioner is subrogated to the rights of the purchaser. *McArthur v Martin*, 23 M 74; *Willis v Jelineck*, 27 M 18, 6 NW 373; *Martin v Sprague*, 29 M 53, 11 NW 143; *O'Brien v Krenz*, 36 M 136, 30 NW 458; *Swanson v Realization Co.* 70 M 380, 73 NW 165.

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. *Sprague v Martin*, 29 M 226, 13 NW 34; *White v Leeds*, 72 M 352, 75 NW 595, 761.

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. *Cuillerier v Brunelle*, 37 M 71, 33 NW 123; *Gates v Ege*, 57 M 465, 59 NW 495; *Darielius v Davis*, 74 M 345, 77 NW 214.

The creditor's judgment being irregular, the redemption operates as an assignment of the certificate. *Grant v Bibb*, 129 M 312, 152 NW 728.

In equity the guarantor holds the fee to the land redeemed as security for his guaranty or the guaranty of his land company, in case the land company must respond for its guaranty on mortgage number one. *Matelski v Farrell*, 159 M 466, 199 NW 227.

In the instant case in order to bar the right of redemption of judgment creditors having liens on the land subordinate to the lien of the mortgage, the certificate of sale must be recorded within 20 days after sale. *Hudson v Upper Mich. Co.* 165 M 172, 206 NW 44.

The effect of redemption from foreclosure sale by a judgment creditor was to give him all the rights of a good faith purchaser of land. *Canty v Bockenstedt*, 170 M 383, 212 NW 905.

Defendant, as attorney for the mortgagor, took a note and third mortgage for his fees, and redeemed from the first mortgage foreclosure. An agreement by which he covenanted to lease the property to the mortgagor is sustained. *Cole v Hughes*, 174 M 180, 218 NW 889.

Failure on the part of mortgagor, in a moratorium proceeding to notify the holder of a subsequent lien, leaves the subsequent claimant free to act pursuant to the statute which gives him the right to redemption. *Tomasko v Cotton*, 200 M 72, 273 NW 628.

Rights of guarantor holding a second mortgage on redeeming from the purchaser at a foreclosure sale under the first mortgage. 9 MLR 164.

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### 580.28 FORECLOSURE PENDING ACTION TO SET ASIDE MORTGAGE; REDEMPTION.

HISTORY. 1876 c. 38 s. 1; G.S. 1878 c. 40 s. 38; 1893 c. 82 s. 1; G.S. 1894 s. 4198; R.L. 1905 s. 4485; G.S. 1913 s. 8151; G.S. 1923 s. 9631; M.S. 1927 s. 9631.

### 580.29 HOLDER OF JUNIOR MORTGAGE MAY PAY DEFAULT IN PRIOR MORTGAGE.

HISTORY. 1923 c. 355 s. 1; G.S. 1923 s. 9632; 1927 c. 413; M.S. 1927 s. 9632; 1943 c. 395 s. 1.

The mortgagee by releasing the mortgagors from their personal obligation to pay the mortgage, did not subordinate its mortgage to appellant's third mortgage obtained from a subsequent purchaser of the premises. *Mpls. Invest. v Nat'l Sec. Co.* 178 M 51, 226 NW 189.

In respect to payment of taxes on mortgaged premises, successive mortgagees are, in the same category as tenants in common. One purchasing from a tax sale is prohibited as to reimbursement by an equitable lien, but he cannot acquire exclusive tax title for himself. *Des Moines Bank v Eisenmenger*, 183 M 46, 235 NW 390.

Under the equitable doctrine of subrogation, when a person having an interest in real estate has paid money to satisfy a mortgage or lien to protect his interests, he is entitled, when justice requires, to be substituted in place of the prior encumbrancer and treated as an equitable assignee of the lien. *First Nat'l v Schunk*, 201 M 363, 276 NW 290.

A surety on a guardian's bond who holds a second mortgage as collateral security for surety's liability on such bond owes his principal the duty of exercising ordinary care for the preservation of such security, provided it is in his possession and control; but this does not impose upon him the obligation of advancing substantial personal funds to prevent or to redeem from the foreclosure of the first mortgage. *Faunce v Schueller*, 214 M 412, 8 NW(2d) 523.

### 580.30 MORTGAGES TO BE REINSTATED IN CERTAIN CASES.

HISTORY. 1923 c. 327 s. 1; G.S. 1923 s. 9633; M.S. 1927 s. 9633.

Laws 1923, Chapter 394, applicable to the defective cancelation of land contracts to which it refers does not confirm and make effectual an attempted cancelation which has been wholly disregarded by both vendor and vendee in the manner stated in preceding paragraph. *Skelton v Grimm*, 156 M 419, 195 NW 139.

See, *Mpls. Invest. v Nat'l Sec. Co.* 178 M 51, 226 NW 189; *First Nat'l v Schunk*, 201 M 359, 276 NW 290.

Section 559.72 does not deprive the mortgagee of his former recourse to the equitable remedy of a receivership to protect security against violation by the mortgagor of his covenants or the equities of the mortgagee. *Gardner v Prindle Co.* 185 M 147, 240 NW 351.