CHAPTER 581

FORECLOSURE OF REAL ESTATE MORTGAGES BY ACTION

581.01 BY ACTION; WHAT RULES GOVERN.

HISTORY. G.S. 1866 c. 81 s. 24; G.S. 1878 c. 81 s. 27; G.S. 1894 s. 6057; R.L. 1905 s. 4486; G.S. 1913 s. 8152; G.S. 1923 s. 9634; M.S. 1927 s. 9634.

1. Object of action

Neither an equitable action for the discharge of a mortgage, nor an action under the statute for determining adverse liens, can be maintained against the mortgagee by one whose only estate or interest in the property described in the mortgage is founded on a title adverse and, if valid, paramount, to that of the mortgagor. Banning v Bradford, 21 M 308.

Where during the period of redemption the wife of the mortgagor paid the required amount and received an assignment of the certificate, the transaction is deemed only an assignment of the legal rights of the mortgagee and not a redemption. Sprague v Martin, 29 M 226, 13 NW 34.

A mortgagee has a mere lien upon real property covered by his mortgage and holds the same only as security for the debt. The purpose of foreclosure is to have the property applied to the satisfaction of the debt. The giving of the mortgage creates no lien in favor of the mortgagee as to rents and profits. Fredin v Cascade Realty, 205 M 256, 285 NW 615.

Is the mortgage only a power of sale under the lien theory of mortgages? 15 MLR 155.

2. A proceeding in personam

An action to foreclose a mortgage is an action in personam. Whalley v Eldridge, 24 M 361; Bardwell v Collins, 44 M 97, 46 NW 315; Carson v Cochran, 52 M 67, 53 NW 1130.

3. A judicial proceeding

"The power of the legislature to extend the time of redemption on mortgage sales under preexisting mortgages should be confined exclusively to sales made by

order of court in the exercise of their equitable powers, and not to such sales as may result from the express contract of the parties." (Modified in later cases.) Stone v Bassett, 4 M 309 (215).

In actions in personam of a strictly judicial character, and proceeding according to the course of the common law, service of the summons, by publication in a newspaper, upon resident defendants who are personally within the state and can be found therein, is not due process of law, and therefore a statute assuming to provide for such service in actions to foreclose mortgages is unconstitutional and void. Bardwell v Collins, 44 M 97, 46 NW 315.

Laws 1935, Chapter 47, and successor enactments (mortgage moratorium law), construed as having created an enlargement of the equity of redemption of a mortgage of real estate. In the case of a foreclosure by action in a federal court relief under the statute cannot be had in the state courts. Weisman v Massachusetts Mutual, 196 M 574, 265 NW 431.

4. Default necessary

The evidence was insufficient to support a finding of default on which judgment of foreclosure was ordered, and there was a reversal on appeal. Farwell v Bale, 49 M 13, 51 NW 621.

5. For instalment; coupon interest note

The holder of coupon interest notes, secured by mortgage, may maintain an action to foreclose the mortgage, although the principal debt is not yet mature, and is held by another person, who is made a party to the suit. Cleveland v Booth, 43 M 16, 44 NW 670.

6. Subsequent action against omitted parties

Plaintiff having bought the premises from the purchaser at the foreclosure sale under the decree in the action on the first mortgage, to which action the defendant, a second mortgagee of the premises, was not a party, as against such second mortgage, holds the premises as assignee of the first mortgage; and an action by the purchaser under the first mortgage foreclosure, brought against junior encumbrancers, who were not parties to such action, to foreclose the equity of redemption under the first mortgage, is, as to the latter, an action for foreclosure de novo. Rogers v Holyoke, 14 M 220 (158); Betson v Day, 78 M 93, 90 NW 864.

Strictly a prior mortgagee is not a proper party to a foreclosure suit by a subsequent mortgagee, but he may be made a party if there is a dispute in respect to their relative rights which may be settled in such suit, and the proper decree entered for a foreclosure sale or redemption, as the nature of the case may require. Foster v Johnson, 44 M 290, 46 NW 350.

Plaintiff was entitled to a second foreclosure as to the city and any omitted parties. Such second foreclosure would not affect the rights of the mortgagor under the first foreclosure, and he need not be made a party. Morey v City of Duluth, 69 M 5, 71 NW 694.

7. Parties plaintiff

In a complaint in an action to foreclose, executed to one of the plaintiffs, an averment that the plaintiff "holds the said mortgage in his own name for the joint use and benefit of said plaintiffs" sufficiently shows joint ownership so that both may be parties plaintiff. Hawke v Banning, 3 M 67 (30).

The evidence is sufficient to show that plaintiff's assignor was the legal owner of the note at the time it was assigned, same having been bequeathed to her by her father. Cullman v Bottcher, 58 M 381, 59 NW 971.

If a trustee in a trust deed (with power of sale) to secure the indebtedness of the grantor to the cestuis que trustent, at a foreclosure sale, without authority to do so, bids in the property in his own name, for the use and benefit of the cestuis que trustent, he is not liable to account for and pay to the beneficiaries

the amount for which the property was bid in. The measure of his liability is to account for the specific property, or its value. Mareck v Minneapolis Trust Co. 74 M 538, 77 NW 428.

Officials of a municipal corporation, in violation of law, loaned its money to a private person, taking mortgage security. The city may invoke the powers of the court to enforce collection of the debt by foreclosure proceedings. City of Fergus Falls v Fergus Falls Hotel, 80 M 165, 83 NW 54.

In an action to foreclose a mortgage which had been assigned to plaintiff as collateral security, such assignor is a party for whose immediate benefit the action is prosecuted, and he may be called for cross-examination. Pipestone Bank v Ward, 81 M 263, 83 NW 991.

8. Parties defendant

Where a conveyance, absolute on its face, is given as security for the note of a third person, and an instrument of defeasance (quitclaim deed) is executed and deposited in escrow, to be delivered on payment of the note, on default an action will lie by the grantee against the grantor, the maker of the note, and the depository of the quitclaim deed, for such relief as he may be entitled to. Nichols v Randall, 5 M 304 (240).

A mortgagee cannot maintain an action to foreclose his mortgage against one who claims the premises, by a title adverse, and if valid, paramount, to that of the mortgagor. Banning v Bradford, 21 M 308.

It appearing from the testimony of a disinterested witness that the defendants made to the plaintiff (deceased since the commencement of the action) the fraudulent representations for which a recovery is sought, the defendants are not permitted (under the statute) to testify that, in the conversation with the deceased, referred to by such witness, they made no such representations. Redding v Godwin, 44 M 358.

In an action to foreclose a mortgage plaintiff may have relief against the fraudulent forfeiture of the leasehold estate which was the subject of the mortgage. This would not be litigating a paramount adverse title in an action of foreclosure within the meaning of the rule laid down in Banning v Bradford, 21 M 308. Churchill v Procter, 31 M 129, 16 NW 694.

In an action under General Statutes 1878, Chapter 75, Section 2, any interest or estate in or lien upon land claimed adversely to the plaintiff may be determined, whether claimed under the same or a different and independent source from that which the plaintiff claims. Walton v Perkins, 33 M 357, 23 NW 527.

Plaintiff alleged that a certain conveyance by him to Richardson was merely in trust for certain purposes, and the trust had been terminated, and asked that title be adjudged in him. Defendants, the assignors of Richardson, had a right to set up any other title, from any source, which they had to the property. Cheever v Converse, 35 M 179, 28 NW 217.

In an action to foreclose a mortgage, the holder of a junior lien being made a party defendant, the parties may litigate the validity of a tax title asserted by the holder of the junior lien as an absolute title to the land, discharged of the lien of the mortgage. Wilson v Jamison, 36 M 59, 29 NW 887.

Where in proceedings to foreclose a mortgage by action a second mortgagee is not made a party, a subsequent action may be brought to bar his equity, subject to his right of redemption. Foster v Johnson, 44 M 290, 46 NW 350.

The heirs of a deceased mortgagor are necessary parties to an action in foreclosure, as is also the administrator or executor, but no judgment for deficiency is obtainable. Any claim for deficiency must be presented for allowance in the probate court. Hill v Townley, 45 M 167, 47 NW 653.

An action to enforce a mechanic's lien is not a special statutory proceeding, but an ordinary civil action. A mortgagee or any party claiming an interest in the premises may be made a party. Finlayson v Crooks, 47 M 74, 49 NW 398.

In a suit by a trustee to foreclose a trust mortgage, and in which other mortgagees are made defendants, a certain mortgagee defendant may demur to the separate portion of the complaint relating to the mortgage. Seibert v M. & St. L. 52 M 148, 53 NW 1134.

A wife's interest in the homestead is such that she may protect it and may redeem from a mortgage having a precedence of the homestead right. A foreclosure by action to which she is not a party will not affect her homestead right. Spalti v Blumer, 56 M 523, 58 NW 156.

The principal debtor may be made a party defendant to a suit by his creditor to foreclose a mortgage held as collateral security for the principal debt. The complaint is not demurrable on the ground that different causes of action are improperly united. First National v Lambert, 63 M 263, 65 NW 451.

Plaintiff was entitled to a second foreclosure as to the city and other omitted parties. Morey v City of Duluth, 69 M 5, 71 NW 694.

9. Pleading

In a complaint in an action to foreclose a mortgage, executed to one of the plaintiffs, an averment that the mortgagee, plaintiff, "holds the said mortgage in his name, for the joint use and benefit of said plaintiffs" sufficiently shows joint ownership, by both plaintiffs, to make them proper parties plaintiff. Hawke v Banning, 3 M 67 (30).

Where a married woman is sued with her husband, in an action to foreclose a mortgage executed by both on her separate estate, she and her husband should answer jointly. It is irregular for her to answer separately without leave of court. Such separate answers, without leave, will, on plaintiff moving it, be struck out. Wolf v Banning, 3 M 202 (133).

The fact that a complaint, in an equitable proceeding for specific performance, does not state facts sufficient to constitute a cause of action against each and every defendant, is not one of the objections for which a demurrer may be interposed. The mere fact that any party claims an interest in the property authorizes the plaintiff to make him a party defendant, so that his claim may be adjudicated. Seager v Burns, 4 M 141 (93).

Where the intention with which a plaintiff made a purchase becomes material in a court of equity, such intent may be directly alleged as a fact, without setting out in the pleading the acts and declarations at the time of the purchase. Wilcox v Davis, 4 M 197 (139).

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

The complaint, an abstract of same given in the opinion, states a cause of action which there is evidence to support. Volmer v Stagerman, 25 M 234.

Special damage is the gist of an action to slander title; and where the special damage relied on is loss of sale of the property disparaged, it is indispensable to allege and show loss of sale to some particular person, and, in the absence of such allegation, the complaint is demurrable. Wilson v Dubois, 35 M 471, 29 NW 170.

An allegation that the mortgage has been duly assigned by B & E for value received, to this plaintiff, to show plaintiff to be the owner of the notes and mortgage. It is no objection that the mortgage runs to B & E in its firm name, and not to individual names. Foster v Johnson, 39 M 378, 40 NW 255.

In an action among other things for the appointment of a receiver, this action can be maintained for the purpose of foreclosing the mortgage of which plaintiff is trustee, and granting that relief is not a material variance from the cause of action alleged in the complaint. Seibert v M. & St. L. 58 M 39, 59 NW 822.

It was sufficient in an action to foreclose where certain parties were made defendants, the complaint alleging, in substance, that they claimed some interest in or lien on the mortgaged premises, but that such lien, if any, was junior to the lien of plaintiff's mortgage. If said parties had such an interest it was incumbent on them to set it up. Howard v Iron Co. 62 M 298, 64 NW 896.

Complaint set forth a mortgage and a default on same as to one defendant, and allegations of fraud in the making of the mortgage as to the other defendant

who had appropriated the money loaned. The complaint was not demurrable on the ground that causes of action were improperly united, and it stated a cause of action against both defendants. Whiting v Clugston, 73 M 6, 75 NW 759.

The contract in question constituted an equitable mortgage upon lands into which the prior mortgages had merged, and plaintiff was entitled to a foreclosure. Piper v Sawyer, 73 M 332, 76 NW 57.

Where it is sought by tender to discharge a mortgage of record, the tender must be of the exact amount due. Kingsley v Anderson, 103 M 510, 115 NW 642, 116 NW 112.

10. Counter-claim

In an action to foreclose a mortgage given for purchase money, the mortgagor may plead as a counter-claim damages from breach of the covenants in the deed to him. Lowry v Hurd, 7 M 356 (282).

In a complaint upon a $1,000 note and mortgage defendant set up that he only received $850.00 from plaintiff's agent and claimed a "set-off and counter-claim" for the difference. The defense thus set up was a partial failure of consideration, and not a counter-claim. Lash v McCormick, 17 M 403 (381).

The evidence sustains the findings that by the agreement of both parties the amounts due each from the other were to be offset or applied in payment of each other; and in any event on the pleadings, evidence, and findings the amount due defendant is sufficiently pleaded, proved and allowed as a counter-claim. Phelps v Compton, 72 M 109, 75 NW 19.

11. Joinder of causes of action

Where a conveyance, absolute on its face, is given as security for the note of a third person and an instrument of defeasance (quitclaim deed) is executed and deposited in escrow to be delivered on payment of the note upon default in payment of the note, an action will be against the grantor in the deed, the maker of the note, and the escrow agent. Nichols v Randall, 5 M 304 (240).

Where plaintiff in his action alleged as to one defendant the making of a note and mortgage and default in payment, and alleged as to the other the acquiring and retention of the money loaned, the causes of action were properly joined. Whiting v Clugston, 73 M 6, 75 NW 759.

12. Defenses

A void foreclosure does not discharge the lien of the mortgage. Folsom v Lockwood, 6 M 186 (119).

Where the note and mortgage being foreclosed was for $1,000, the fact that the mortgagor only received $850.00 may be pleaded as a partial failure of consideration, and not as a counter-claim. Lash v McCormick, 17 M 403 (381).

Redemption from foreclosure by "assigns" of the mortgagor annuls the sale and leaves the mortgage enforceable as security for other instalments of the mortgage as they mature and are unpaid, and judgment may be obtained against the mortgagor for any deficiency. Herber v Christopherson, 30 M 395, 15 NW 676.

The pendency of one action is not a bar to another where the relief sought in the two is entirely different, although the same question may be to some extent involved in both. Coles v Yorks, 31 M 213, 17 NW 341.

To constitute a "mortgagee in possession" the mortgagee must be in possession by reason of the assent express or implied of the mortgagor, and to have possession under the mortgage. Such is herein established by the evidence. Rogers v Benton, 39 M 39, 38 NW 765.

A partnership, B and E, assigned the note and mortgage to plaintiff who, on default, foreclosed. It is no defense that the mortgage ran to B and E in their firm name and not to individuals. Foster v Johnson, 39 M 378, 40 NW 255.

Defendant cannot be permitted to reply on a breach of his own covenant to deprive plaintiff of his right to collect his debt by enforcement of the mortgage or otherwise. Farwell v Bale, 49 M 21, 51 NW 621.

In an action to foreclose, the mortgagor, and those claiming under him, cannot set up as a defense that he had no title to the mortgaged premises. Carson v Cochran, 52 M 67, 53 NW 1130.

In the instant case where after the mortgage was executed the land was laid out in lots and blocks, the mortgagee joining in the dedication, each parcel wholly surrounded by streets and alleys, was so far a distinct tract that the court could enjoin the sale of two or more of the tracts as a separate parcel. As between the mortgagor and his assignee, certain partial payments should be applied first on payment of interest and do not entitle the mortgagor to partial release of the premises. Bayview Co. v Myers, 62 M 265, 64 NW 816.

A sale of mortgaged property in foreclosure proceedings, declared to be illegal and invalid on the ground of fraud, could not, as to mortgagor, operate to extinguish a valid mortgage to satisfy which the sale was made. Lindgren v Lindgren, 73 M 90, 75 NW 1034.

In defense of an action to foreclose a mortgage it is competent as a defense for the defendant to allege and prove that there was no consideration for the mortgage. Anderson v Lee, 73 M 397, 76 NW 24.

Purchasers of property subsequent to the execution of the mortgage, but with notice of the mortgage lien, cannot take advantage of the fact that the act of the city officials in loaning the city money and taking a mortgage therefor was ultra vires. City of Fergus Falls v Fergus Falls Hotel, 80 M 165, 83 NW 54.

In this case where a deed and contract are deemed a mortgage, it is not important that respondent in a demand for the performance of a contract, requested payment of more cash than appellant was required to pay. Spielman v Albinson, 183 M 282, 236 NW 319.

Foreclosure was for $1,500 and interest, the face of the mortgage. There being no estoppel (by a payment of interest), plaintiff was entitled to enjoin the foreclosure for more than the $400.00 she obtained from the mortgagee. The assignee took the mortgage to the equities that existed between the original parties. Chamberlin v Twin Ports Co. 195 M 58, 261 NW 577.

13. Issues which may be litigated

Neither an equitable action for the discharge of a mortgage, nor an action for determining adverse liens, can be maintained against the mortgagee by one whose only estate or interest is founded on a title adverse to and, if valid, paramount, to that of the mortgagor. Banning v Bradford, 21 M 308.

In an action to foreclose her mortgage, plaintiff might have relief against the fraudulent forfeiture of the leasehold estate which was the subject of the mortgage. This was not litigating a paramount adverse claim as in Banning v Bradford, 21 M 308. Churchill v Procter, 31 M 129, 16 NW 694.

In an action to foreclose a mortgage, the holder of a junior lien being made a party defendant, the parties may litigate the validity of a tax-title asserted by the holder of the junior lien as an absolute title to the land, discharged of the lien of the mortgage. Wilson v Jamison, 36 M 59, 29 NW 887.

In actions in personam service by publication on resident defendants is not "due process of law." Bardwell v Collins, 44 M 97, 46 NW 315.

Strictly, a prior mortgagee is not a party to a foreclosure suit by a subsequent mortgagee, but he may be made a party if there is a dispute in respect to their relative rights which may be settled in such suit. Foster v Johnson, 44 M 290, 46 NW 350.

An owner of an undivided one-half of a tract sold under foreclosure can only redeem his share by redeeming the entire estate. Such redemptioner has a lien in the nature of an equitable mortgage which he may foreclose and which is superior to a second mortgage given by his cotenant. Buettel v Harmount, 46 M 481, 49 NW 250.

In an action by a borrowing member of a mutual loan association for reformation of the mortgage, defendant consented to the reduction by alleging that the mortgagor was in default and demanded foreclosure for the proper amount. This

was held to be a proper counter-claim arising as it did from the same transaction. Lahiff v Hen. Co. Ass'n, 61 M 226, 63 NW 493.

The principal debtor may be made a party defendant to a suit by his creditors to foreclose a mortgage held as collateral security, and the court may proceed to a complete adjudication of all issues between the parties arising from the transaction. First Nat'l v Lambert, 63 M 263, 65 NW 851.

As between first and second mortgagee, it is the duty of each to pay the taxes; and one cannot acquire a tax title on mortgaged premises as against the other; but where the second mortgagee paid the taxes, he will be entitled to reimbursement when his rights as second mortgagee are cut off by the expiration of redemption under foreclosure of the first mortgage. Norton v Met. Life, 74 M 484, 77 NW 298, 539.

An adverse title paramount to the mortgage cannot over objection be litigated in a foreclosure action. Dickerman v Oliver Co. 135 M 254, 160 NW 776; Farmers' Bank v Woolery, 156 M 193, 194 NW 759.

14. Jury trial

Judgment against the mortgagor for a deficiency is sustained, he not denying the indebtedness nor asking for a jury trial. Herber v Christopherson, 30 M 395, 15 NW 676; Spalti v Blumer, 63 M 269, 65 NW 454.

15. Burden of proof

In an action by an assignee of a second mortgage to recover a surplus arising from a foreclosure sale on the first mortgage, the answer denied the execution of the second mortgage. It was introduced in evidence on the trial, but the note secured by it was not, nor its absence accounted for. This was a fatal defect in plaintiff's proof, and judgment was properly ordered for defendant. Gray v Blabon, 74 M 344, 77 NW 234.

16. Notice of election; treating whole amount due

A creditor who, by his contract, has a right, upon default of the debtor as to part of the debt, to treat the whole debt as due before the time fixed for its payment, may make his election that the whole shall be due by bringing suit for it. N. W. Mutual v Allis, 23 M 337; Fowler v Woodward, 26 M 347, 4 NW 231.

The note contained an acceleration clause which the extension agreement continued in force, so that, when default in payment of interest and taxes occurred, plaintiff rightfully declared the whole debt due. Amidon v Traverse Land Co. 181 M 249, 232 NW 33.

17. Findings

Where, in findings directing foreclosure the amount is not stated, the court may later make an order fixing the amount, and this is deemed a part of the findings. Where the case is tried to the court, and there is no settled case or bill of exceptions, the appellate court will assume that the parties by consent litigated all the matters of fact in the findings, though some were not within the issues made by the pleadings. Baker v Byerly, 40 M 489, 42 NW 395.

After the court filed its findings of fact in an action to foreclose the first mortgage, the second mortgagee moved that the conclusions be amended so as to order that the mortgaged premises be sold in the inverse order of alienation. No such issue having been raised in its answer or litigated on the trial, the court did not err in denying the motion. Norton v Met. Life, 74 M 484, 77 NW 298, 539.

18. Accounting

The leasehold was the partnership property of Cahill, Townshend & Proctor. This is an action to foreclose on the leasehold. Plaintiff had notice that the premises were occupied by the copartnership of three. Under these facts, plaintiff's mortgage was subject to all the equities of the partnership, and hence she

would be only entitled to her mortgagor's interest in what remains after these equities are fully adjusted, which could only be determined upon a full accounting of the business of the partnership. She may have such accounting in the same action as her foreclosure. Churchill v Proctor, 31 M 129, 16 NW 694.

581.02 APPLICATION OF CERTAIN SECTIONS FROM CHAPTER 580.

HISTORY. 1889 c. 31 s. 1; G.S. 1894 s. 6065; 1897 c. 253 s. 1; R.L. 1905 s. 4487; G.S. 1913 s. 8153; G.S. 1923 s. 9635; M.S. 1927 s. 9635.

581.03 JUDGMENT; TRANSCRIPT TO SHERIFF.

HISTORY. G.S. 1866 c. 81 ss. 26, 27; G.S. 1878 c. 81 ss. 29, 30; G.S. 1894 ss. 6059, 6060; R.L. 1905 s. 4488; G.S. 1913 s. 8154; G.S. 1923 s. 9636; M.S. 1927 s. 9636.

1. The judgment
2. Who not bound
3. Modification
4. Opening default
5. Sale
6. Distribution of proceeds

1. The judgment

It should direct the sale of only so much of the land as may be necessary to satisfy the judgment. Johnson v Williams, 4 M 260 (183).

The court cannot grant a decree of foreclosure to the owner of a second mortgage, conditioned upon the exercise of the right of redemption by the mortgagor under the first mortgage. Potter v Marvin, 4 M 525 (410).

The judgment is protected by the same presumptions of regularity and jurisdiction as an ordinary judgment. It is not subject to collateral attack for irregularity. It is a final judgment. Hotchkiss v Cutting, 14 M 537 (408); Smith v Valentine, 19 M 452 (393).

Entry of the judgment in a "Decree Book" was in the instant case, not fatal. Thompson v Bickford, 19 M 17 (1).

A mortgagee cannot maintain an action against one who claims the premises by a title adverse and if valid, paramount to that of the mortgagor. Banning v Bradford, 21 M 308.

The judgment prescribed by this section determines all the issues in the action, and provides just the relief to which the plaintiff is entitled. When it is entered all controversy as to the respective rights between the plaintiff and the several defendants with respect to the mortgage and the right to enforce it is determined. All that follows the judgment, the sale, report of sale, confirmation, and similar, are merely to carry into effect and enforce the determination of the rights of the parties which the judgment makes. Dodge v Allis, 27 M 376, 7 NW 732.

Yorks, a married man owning 12 city lots, in which he had an unselected and unascertained homestead, executed a mortgage on the entire block. The holder of the mortgage may maintain an action for foreclosure, in which he may have the homestead ascertained and set off, and the remainder of the block sold to satisfy the mortgage. Coles v Yorks, 31 M 213, 17 NW 341.

The title sold rests on the judgment. There is no going behind the judgment to ascertain if the mortgage was sufficient to operate as a conveyance. Foster v Johnson, 39 M 378, 40 NW 255.

In all cases of foreclosure it is necessary to have a judgment adjudging the amount due on the mortgage in order to determine the sum to be realized out of the security; and, in cases where the plaintiff is not entitled to a personal judgment for the debt, this is its only purpose and effect. Slingerland v Sherer, 46 M 422, 49 NW 237.

Where the junior mortgagee makes the holders of prior mortgages parties to the suit, and the court declares his mortgage prior as to certain mortgaged prop-

erty, the mortgagor is not aggrieved thereby and cannot, on appeal, assign this as error. Seibert v M. & St. L. 58 M 39, 59 NW 822.

The judgment prescribed by this section is not a personal judgment which may be docketed and become a lien before sale of the mortgaged premises and the application of the proceeds upon the debt as prescribed by section 581.09. Thompson v Dale, 58 M 365, 59 NW 1086.

If the plaintiff fails to establish his lien and right to foreclose but establishes a cause of action for the recovery of money, he may have an ordinary personal judgment with all its incidents. Thompson v Dale, 58 M 365, 59 NW 1086; Louisville Co. v Blake, 70 M 252, 73 NW 155.

The judgment binds the parties and their privies by estoppel as an ordinary judgment and is conclusive as to the right to foreclose, including the validity of the mortgage. Northern Trust v Crystal Lake, 67 M 131, 69 NW 708.

The judgment should not bar interest prior to the mortgage. McLaughlin v Nicholson, 70 M 71, 72 NW 827, 73 NW 1; McLaughlin v Betcher, 87 M 1, 91 NW 14.

A trust deed construed, and held that it does not require the trustee to pay taxes and prior liens upon separate parcels of the mortgaged premises, as to which he asserts no claim in his foreclosure proceedings. Internat'l Trust v Upton Grove Co. 71 M 147, 73 NW 716.

When the complaint alleges that a defendant claims a lien which if valid is subsequent to the mortgage, he is bound by the decree so adjudging, subject to his right to correct it on appeal, and he cannot attack it collaterally. Dickerman v Oliver Mining, 135 M 257, 160 NW 776.

In an action to foreclose a mortgage, the plaintiff is not entitled to a personal judgment against a defendant in the action who is not personally liable for payment of the mortgage debt. Berkner v Ekman, 153 M 277, 190 NW 259.

In the exercise of judicial discretion it was not improper for the court, on the 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 the defendants for a debt not yet due. Winne v Lohart, 155 M 311, 193 NW 587.

The confirmation of the sheriff's report of a sale in a real estate foreclosure proceeding has the effect of a judgment and cannot be attacked collaterally. Singer v Novak, 167 M 208, 208 NW 654.

An acceleration clause in a mortgage not contained in the note does not entitle the holder of the note and mortgage to a personal judgment against the maker of the note and mortgage, nor against one who has purchased the property and assumed the debt, prior to the due date fixed in the note. Kiewel v Knutson, 169 M 293, 211 NW 1.

The evidence supports a finding that the grantee of the mortgagor did not assume the debt, and no deficiency judgment may be taken against him. First State Bank v Pearson, 172 M 366, 215 NW 516.

The so-called modification decree (changing the amount) is in fact an appealable order made subsequent to the judgment and affecting it; but, being made on appellants' motion and in their favor, they were not aggrieved thereby. Fidelity Trust v Brown, 181 M 466, 233 NW 10.

A deficiency judgment entered by the clerk, after the sale, without order of the court and without notice to the defendant, is but a clerical computation of the amount of the deficiency. It imposes no new liability. Execution may issue. Orth v Hagedorn, 185 M 585, 242 NW 292.

The defendant did not lose or waive his right to have the deficiency judgment vacated by failing to apply to the court to have the judgment reopened so as to set up his discharge in bankruptcy as a bar. Orth v Hagedorn, 185 M 585, 242 NW 292. Judgment in an action for the foreclosure of a mortgage is res judicata and not open to such collateral attack as an action to restrain trespass. Brown v Gallinger, 188 M 22, 246 NW 473.

The only judgment provided by statute is one adjudging the amount due with costs on the mortgage, directing a sale, and directing the sheriff to report. No personal judgment for any deficiency can be filed until after confirmation of the

sale and application of the proceeds to the debt, so that the deficiency can be computed. Peoples Bank v Ruppert, 189 M 353, 249 NW 325.

Because certain tax certificates had been included as to amount, in a judgment for money, and had thereby become merged as to the debt, in the judgment, they were discharged by the satisfaction of the judgment. It was error of the trial court to hold the certificates evidenced a lien prior to the mortgage. Walton v Invest. Co. 200 M 337, 274 NW 239.

The court retains jurisdiction after the entry of judgment and after the time to appeal has expired for the purpose of controlling the foreclosure sale, and may permit a lien claimant to waive completely worthless lien rights included in the judgment and order entry of a personal judgment against defendant personally liable for the debt without first requiring a foreclosure sale. Smude v Amidon, 214 M 266, 7 NW(2d) 776.

2. Who not bound

Persons not made parties, and not in privity with parties are unaffected by the judgment, the action being in personam. Rogers v Holyoke, 14 M 220 (158); Martin v Fridley, 23 M 13; Whalley v Eldridge, 24 M 358; Whitney v Huntington, 37 M 197, 33 NW 561; Harper v East Side Synd. 40 M 381, 42 NW 86; Bardwell v Collins, 44 M 97, 46 NW 315; Spalti v Blumer, 56 M 523, 58 NW 156; Nolan v Dyer, 75 M 231, 77 NW 786; Beeson v Day, 78 M 88, 80 NW 864.

A mortgagee of a tract of land exceeding 80 acres, including the homestead of the mortgagor, is not bound by a judgment, to which he is not a party, foreclosing a mechanic's lien and reducing the exempt homestead below the 80-acre limit. Talbot v Barager, 37 M 208, 34 NW 23.

Through fraud of Dyer, then owner of certain property, and holder of a certificate of sale through foreclosure by action of a first mortgage on the property, the plaintiff Nolan, a trustee in several subsequent mortgages, was prevented from redeeming in due time. Nolan, not being a party to the first mortgage foreclosure, may maintain an action for relief. The remedy, if any, by motion in the foreclosure action, was not exclusive. Nolan v Dyer, 75 M 231, 77 NW 786.

Parties as to whom the action is dismissed are not bound. Banning v Sabin, 41 M 477, 43 NW 329, 45 M 431, 48 NW 8.

A mortgagee pendente lite held bound by the judgment. Banning v Sabin, 51 M 129, 53 NW 1.

3. Modification

There was no error in the trial court denying defendant's application for a modification of the judgment directing the payment of attorney's fees. Murray v Chamberlin, 67 M 12, 69 NW 474.

A purchaser at foreclosure sale must be made a party or be given notice of an application to vacate or modify a judgment, and if not made a party or given notice, the modification will be, as to him, void and inoperative to affect his title. Aldrich v Chase, 70 M 243, 73 NW 161.

After foreclosure but before judgment had been entered, on a showing that the lien on the property had been extinguished, plaintiff obtained from the court an order modifying the order, and merely ordering a personal judgment for the amount. As this was within the allegations of the complaint and prayer for relief the modification was valid even without notice to defendant. Louisville Co. v Blake, 70 M 252, 73 NW 155.

Neither the findings of the trial court, nor the record, discloses any personal obligation on the part of Ekman to pay the debt. He merely hypothecated his land as security. No personal judgment should be had against him, and the judgment should be modified accordingly. Buckner v Ekman, 153 M 280, 190 NW 259.

Plaintiff purchased at sheriff's sale for full amount of mortgage debt. Defendant as owner of the fee, subject to the foreclosure, had such interest in the property as to justify it in moving the court for an accounting by the receiver who had been in possession pendente lite. Fredin v Cascade Realty, 205 M 256, 285 NW 615.

Where the trustee bid in the mortgaged property at foreclosure sale for full amount of outstanding mortgage bonds and sale was confirmed, bonds were paid in full, were commercially dead, and were no longer obligations of mortgagor and merely represented bondholder's pro rata share in proceeds of redemption or in land itself or proceeds thereof upon trustee's sale after expiration of redemption period. Olmsted Bank v Pesch, 218 M 424, 16 NW(2d) 470.

4. Opening default

Upon a proper application, seasonably made, the district court may set aside or modify its judgments in foreclosure actions, and the proceedings in execution thereof, in favor of any party whose rights have been injuriously affected. Russell v Blakeman, 40 M 463, 42 NW 391.

A judgment by default is attended with the same legal consequences, when considering the rules governing estoppel by judgment, as if there had been a verdict for plaintiff. The trial court in the instant case properly denied the motion to reopen. Northern Trust v Crystal Lake Cemetery, 67 M 131, 69 NW 708.

5. Sale

Only so much property should be sold as will satisfy the mortgage debt. Johnson v Williams, 4 M 260 (183).

A mortgage foreclosure sale is a judicial sale. Stone v Bassett, 4 M 298 (215).

Where the judgment directs the sale be made by the sheriff, it may be made by his deputy. Hotchkiss v Cutting, 14 M 537 (408).

Where a mortgage covers an exempt homestead and additional lands, the mortgagor is entitled, upon the foreclosure, to have the non-exempt property sold first and applied to the satisfaction of the mortgage debt. Horton v Kelly, 40 M 193, 41 NW 1031.

6. Distribution of proceeds

Where a mortgage given to secure two notes is foreclosed, the proceeds should be applied ratably on both debts. Borup v Ninniger, 5 M 523 (417).

If a mortgage secures several notes held by different parties, the proceeds, if insufficient to pay in full, should in the absence of an agreement to the contrary, be applied pro rata towards the payment of all the notes without regard to the time of their transfer or maturity. Wilson v Eigenbrodt, 30 M 4, 13 NW 907; Hall v McCormick, 31 M 280, 17 NW 620.

A mortgagee holding several notes secured by mortgage may assign the security to an assignee of one of the notes, so as to give him a preference in the application of the proceeds realized therefrom. Solberg v Wright, 33 M 224, 22 NW 381.

If the sheriff distributes the proceeds as directed by the judgment, he is not liable. Hill v Rasicot, 34 M 270, 25 NW 604.

A trust deed construed and it is held that the deed does not require the trustee to pay taxes and prior liens upon separate tracts of the premises, as to which he asserts no claim in his foreclosure proceedings. Internat'l Trust v Upton Grove Co. 71 M 147, 73 NW 716.

581.04 SEPARATE TRACTS.

HISTORY. G.S. 1866 c. 81 s. 38; G.S. 1878 c. 81 s. 41; G.S. 1894 s. 6071; R.L. 1905 s. 4489; G.S. 1913 s. 8155; G.S. 1923 s. 9637; M.S. 1927 s. 9637.

As it does not affirmatively appear that the premises constitute more than one parcel or tract, the court did not err in ordering it, or so much as necessary, sold on foreclosure sale as one parcel. Von Hemert v Taylor, 76 M 386, 79 NW 319.

581.05 PURCHASE BY MORTGAGEE.

HISTORY. G.S. 1866 c. 81 s. 28; G.S. 1878 c. 81 s. 31; G.S. 1894 s. 6061; R.L. 1905 s. 4490; G.S. 1913 s. 8156; G.S. 1923 s. 9638; M.S. 1927 s. 9638.

Where a trustee in a trust deed, with authority to do so, bids in the property in his own name for the benefit of the cestuis que trustent, he is not liable for the amount of the bid, but his measure of liability is to account for the specific property or its proceeds. Mareck v Mpls. Trust Co. 74 M 538, 77 NW 428.

Where an attorney who foreclosed a mortgage had authority to bid in the property at the sale, the fact that his client failed to notify him of the amount to be bid, and he bid it in for the full amount due, furnishes no ground for setting aside the sale. Flaherty v Davenport, 160 M 157, 199 NW 904.

Any right which a mortgagee may have had to require rents to be applied on taxes terminated with the foreclosure sale. The purchaser took the property subject to taxes then a lien on the property as well as those subsequently accruing. Fredin v Cascade Realty, 205 M 256, 285 NW 615.

581.06 SURPLUS.

HISTORY. R. S. 1851 c. 85 s. 9; P.S. 1858 c. 75 s. 9; G.S. 1866 c. 81 ss. 34, 35; G.S. 1878 c. 81 ss. 37, 38; G.S. 1894 ss. 6067, 6068; R.L. 1905 s. 4491; G.S. 1913 s. 8157; G.S. 1923 s. 9639; M.S. 1927 s. 9639.

Where land is sold under foreclosure, two or more parties being interested therein, the proceeds will be divided pro rata according to the interests of the parties as they appear, except as one may have priority by contract. The $1,800 note retained by defendant represented the purchase money of the land, and is clothed with all the equities in favor of an unpaid vendor. Weeks v Weeks, 162 M 93, 202 NW 277.

581.07 FORECLOSURE FOR INSTALMENT; DISMISSAL; STAY.

HISTORY. R.S. 1851 c. 94 ss. 67, 68; P.S. 1858 c. 83 ss. 18, 19; G.S. 1866 c. 81 ss. 36, 37; G.S. 1878 c. 81 ss. 39, 40; G.S. 1894 ss. 6069, 6070; R.L. 1905 s. 4492; G.S. 1913 s. 8158; G.S. 1923 s. 9640; M.S. 1927 s. 9640.

581.08 REPORT; CONFIRMATION; RE-SALE.

HISTORY. G.S. 1866 c. 81 s. 29; G.S. 1878 c. 81 s. 32; G.S. 1894 s. 6062; R.L. 1905 s. 4493; G.S. 1913 s. 8159; G.S. 1923 s. 9641; M.S. 1927 s. 9641.

1. Confirmation
2. Re-sale

1. Confirmation

The district court has no power to order a re-sale until the coming in of the report of sale; and the objection to the exercise of such power may be urged in the appellate court in the first instance. Gilman v Holyoke, 14 M 138 (104).

Until the confirmation of the sale, upon the coming in of the report of sale, the proceedings are not complete, and may for good cause be set aside by the court. Rogers v Holyoke, 14 M 220 (158).

The court retains jurisdiction for the purpose of controlling the sale, and in the exercise of such control may permit the plaintiff to waive his (in this case worthless) lien rights included in the judgment, and order entry of a personal judgment against defendant liable for the debt without requiring any sale. Smude v Amidon, 214 M 266, 7 NW(2d) 776.

2. Re-sale

See Gilman v Holyoke, 14 M 138 (104); Rogers v Holyoke, 14 M 220 (158).

Reasons founded on irregularities in making the sale are not available, upon application after final decree to set aside the sale, decree of confirmation, and final decree, unless a sufficient excuse is shown for failure to present such reasons in opposition to the confirmation. Coles v Yorks, 36 M 388, 31 NW 353.

A re-sale was ordered with a direction that the property be sold in one parcel. Objections appealed from the order claiming the store leases should have

been ordered sold separately. Held, the rentals are an incident to the land and follow the title, and the order did not amend the judgment or affect substantive rights, but was merely a procedural order and not appealable. Fidelity v Brown, 180 M 173, 230 NW 780.

581.09 SATISFACTION OF JUDGMENT; EXECUTION FOR DEFICIENCY.

HISTORY. G.S. 1866 c. 81 s. 30; G.S. 1878 c. 81 s. 33; G.S. 1894 s. 6063; R.L. 1905 s. 4494; G.S. 1913 s. 8160; G.S. 1923 s. 9642; M.S. 1927 s. 9642.

One purpose of a judgment in a foreclosure action is to determine how much the plaintiff is entitled to receive out of the the proceeds of the sale. Unless he is also entitled to a personal judgment such is the sole purpose and effect of the judgment. It was the proper procedure in the instant case to strike out that part of the order relating to a deficiency judgment, for which the mortgage was in default, the note was not as yet due. Winne v Lohart, 155 M 311, 193 NW 587.

The mortgagor conveyed the land to a third party who assumed the mortgage. When the mortgage came due an extension was arranged, the mortgagor being a party to the extension. The decree of foreclosure rightfully provided for a deficiency judgment against the mortgagor. Amidon v Traverse Land Co. 181 M 249, 232 NW 33.

The entry of a deficiency judgment is a mere clerical computation within the duties of the clerk, and if based on the judgment order, it does not require an additional order from the court. The defendant did not waive his right to have the judgment set aside, after his discharge in bankruptcy by failing to apply to the court to reopen the case to plead his discharge. Orth v Hagedorn, 185 M 585, 242 NW 292.

Negotiations were had relating to the waiver of the right to a deficiency judgment in consideration of immediate possession. The offer of the mortgagee not being accepted, it had the legal right to withdraw the offer at any time. New England Mut. v Mannheimer, 188 M 511, 247 NW 803.

If upon sale made and confirmed there remains a deficiency, the clerk then enters satisfaction of the judgment to the extent of credit from the sale, dockets the original judgment as a personal judgment for the deficiency, and issues execution thereon. Peoples Bank v Ruppert, 189 M 353, 249 NW 325.

Where the mortgagee obtained an assignment of rents as consideration for an extension, and where on foreclosure and sale there was a deficiency, the mortgagee could, on appropriate proceedings, collect such rents, so assigned, and apply same on the deficiency. Prudential v Enkeme, 196 M 154, 264 NW 576.

The court retains jurisdiction after the entry of judgment to control the sale, and in the exercise of that function may permit the mortgagee to waive its lien rights and authorize the entry of a personal judgment forthwith and without notice. Smude v Amidon, 214 M 266, 7 NW(2d) 776.

The sale under foreclosure of property covered by a trust deed securing a series of bonds resulted in sufficient bid to cover principal, interest and costs. The grantor's debt was thereby fully paid, and the bonds ceased to exist except as evidence of the bondholder's right to his share of the proceeds of the sale. Olmstead Bank v Pesch, 218 M 424, 16 NW(2d) 470.

581.10 REDEMPTION BY MORTGAGOR, CREDITOR.

HISTORY. G.S. 1866 c. 81 s. 31; G.S. 1878 c. 81 s. 34; 1883 c. 25 s. 1; G.S. 1894 s. 6064; 1899 c. 37; R.L. 1905 s. 4496; G.S. 1913 s. 8167; G.S. 1923 s. 9643; M.S. 1927 s. 9643.

The period of redemption cannot be shortened or extended by the court. Whittacre v Fuller, 5 M 508 (401).

A junior mortgagee not a party to the action cannot redeem from the sale, but must, if he redeems at all, redeem from the entire mortgage by paying the whole of it. Martin v Fridley, 23 M 13.

A judgment for plaintiff, in an action to redeem, has the effect of a strict foreclosure of the mortgage if the plaintiff fails to redeem as allowed by the

judgment. In such a judgment, one year must be allowed in which to redeem. Hollingsworth v Campbell, 28 M 18, 8 NW 873.

The sale of the land, pursuant to the judgment in the foreclosure action, was subject to any right of redemption which a judgment creditor, whose judgment was junior to the mortgage, or those succeeding to his interest, might have. Banning v Sabin, 45 M 431, 48 NW 8.

Where the foreclosure sale was confirmed, the owner of the fee being a party to the suit while the wife was not, the wife's equity of redemption was not barred. N. W. Trust v Ryan, 115 M 143, 132 NW 202.

Although the legal title does not vest in the purchaser until the expiration of the period of redemption, yet, when it so vests, it relates back and takes effect as of the date of the mortgage. Allis v Foley, 126 M 15, 147 NW 670.

If a redemption is made by a judgment creditor whose right to make it, though good on the face of the record, has, in fact, been destroyed by the tender of the payment of the judgment, the title of the purchaser at the sale nevertheless passes to him, if the holder thereof accepts the redemption money with full knowledge of the tender. Orr v Sutton, 127 M 38, 148 NW 1066.

The time to redeem from a foreclosure sale under a mechanic's lien dates from the confirmation of the sale and not from the day of sale. Salmon v Central Trust, 157 M 371, 196 NW 468.

Where a second mortgage is foreclosed, the purchaser takes the property subject to all prior liens then due or thereafter to become due and is not entitled to have the rents and profits which accrue during the period of redemption applied in payment of such liens. Grady v First State Co. 179 M 571, 229 NW 874.

The proceeding for forfeiture of an executory contract for the sale of land is in the nature of a strict foreclosure of the vendee's interest, and no right of redemption survives the 30 days' notice. Minn. Loan Ass'n v Closs, 182 M 453, 234 NW 872.

Title to real estate acquired through a creditor's redemption from a foreclosure sale is held to be absolute. Rochester Loan v Fraser, 188 M 346, 247 NW 241.

Where a contract of settlement was made in open court, the court properly extended the period of redemption, and the fact that the contract dealt with personal property also did not vitiate the contract or the court's order. State ex rel v District Court, 194 M 32, 259 NW 542.

The record does not indicate that the title to the real estate was involved. The mere statement that the title is involved does not make it so. There must be evidence to that effect, when claiming lack of jurisdiction in the trial court. Mpls. Loan v King, 198 M 421, 270 NW 148.

The moratorium act is remedial in its purpose. It is the duty of the court, within the limits of the act, so to construe it as to avoid forfeitures. When the redemption creditor steps into the shoes of the certificate holder, that carries with it benefits, advantages, burdens and limitations. Tomasko v. Cotton, 200 M 75, 273 NW 628.

The fee title does not pass to the purchaser until the period of redemption has expired. The purchaser becomes entitled only to the rights, and takes the property subject to the conditions, fixed by law for the redemption of the foreclosed property. Fredin v Cascade Realty, 205 M 260, 285 NW 615.

581.11 DELIVERY OF POSSESSION.

HISTORY. G.S. 1866 c. 81 s. 39; G.S. 1878 c. 81 s. 42; G.S. 1894 s. 6072; R.L. 1905 s. 4497; G.S. 1913 s. 8168; G.S. 1923 s. 9644; M.S. 1927 s. 9644.

Reasons founded on irregularities in making the sale are not available, upon an application after final decree, to set aside the sale, unless a sufficient excuse is shown for failure to present such reasons in opposition to the application to confirm the sale. Coles v Yorks, 36 M 388, 31 NW 353.

Where the mortgage provides that on default in the payment of interest, taxes, or insurance, the mortgagee may collect rents and apply them in payment of same, the tenant stands on the same footing as the mortgagor. The mortgagee

cannot have the rents to apply on the mortgage debt, but may have them for the purpose of preserving the property by paying taxes and insurance. Cullen v Minn. Loan, 60 M 6, 61 NW 878.

In the instant case the evidence justifies the action of the trial court in appointing a receiver of the mortgaged premises pending the action of foreclosure. Marshall Bank v Cody, 75 M 241, 77 NW 831.

Thirty days after expiration of time to redeem, no one having redeemed, and the mortgagor withholding possession from the purchaser, the court properly incorporated into its final decree that the purchaser have execution for recovery of the premises. Belknap v Van Ripen, 76 M 268, 79 NW 103.

581.12 STRICT FORECLOSURE.

HISTORY. 1870 c. 58 s. 2; G.S. 1878 c. 81 s. 43; G.S. 1894 s. 6073; R.L. 1905 s. 4498; G.S. 1913 s. 8169; G.S. 1923 s. 9645; M.S. 1927 s. 9645.

Prior to the enactment of Laws 1870, Chapter 58, the power to award strict foreclosure was less restricted than it is at present. Stone v Bassett, 4 M 298 (215); Heyward v Judd, 4 M 483 (375); Pace v Chadderdon, 4 M 499 (390); Drew v Smith, 7 M 301 (231); Bacon v Cottrell, 13 M 194 (183).

Strict foreclosure is rarely justifiable. Wilder v Haughey, 21 M 101; Hollingsworth v Campbell, 28 M 18, 8 NW 873; Morey v City of Duluth, 69 M 5, 71 NW 694.

By a strict foreclosure the conditional title acquired by the mortgage is made absolute in the mortgagee, the property being thus applied directly to the satisfaction of the debt. Sprague v Martin, 29 M 226, 13 NW 34.

Strict foreclosure is authorized by our statute when as in the instant case, such remedy is just or appropriate. The final decree in strict foreclosure cannot be rendered until after judgment adjudging the amount due. Blanchard v Hoffman, 154 M 530, 192 NW 352.

Strict foreclosure. 23 MLR 388.