

## CHAPTER 581

## FORECLOSURE OF REAL ESTATE MORTGAGES BY ACTION

**581.01 BY ACTION; WHAT RULES GOVERN.**

In a suit to have a deed of general warranty declared to be a mortgage and for an accounting by the grantee as mortgagee in possession, the true test is to determine the intention of the parties to the transaction, that is, whether they intended security or a sale. In applying the test, it is necessary to consider all relevant facts surrounding the transaction, the situation of the parties, as well as written memorials. *Hewitt v Baker*, 222 M 292, 24 NW(2d) 47.

Default of mortgagor due to negligence. 15 MLR 124.

Mortgage as only a power of sale. 15 MLR 146.

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

**581.03 JUDGMENT; TRANSCRIPT TO SHERIFF.**

A purchaser at a mortgage foreclosure sale acquires every right and interest held by the mortgagor in mortgaged property, together with all subsequently acquired rights, easements and privileges thereon and thereof. *Tomasco v Cotton*, 200 M 69, 273 NW 628.

A purchaser of mortgaged property at public sale takes it subject to all taxes without a lien thereon as well as those subsequently accruing. *Fredin v Cascade Realty*, 205 M 256, 285 NW 615.

**581.08 REPORT; CONFIRMATION; RE-SALE.**

Upon taking possession of mortgaged property the mortgagee contracted, in the event of foreclosure, either to buy the property for the amount of the debt or to release any deficiency judgment procured pursuant to foreclosure. Upon foreclosure the whole debt would be discharged, either by purchase for the full amount or by force of the mortgagee's obligation to discharge any deficiency. A purchase under foreclosure, subject to accrued taxes, prevents the mortgagee from applying rentals accrued after the foreclosure and during the period of redemption in reduction of such taxes, because such credit would amount to giving the foreclosure purchaser the property for less than his bid. *Wagner v Bankers Life Co.* 206 M 118, 288 NW 1.

Any right which a mortgagee may have had to require rents to be applied on taxes terminated with the foreclosure sale. When plaintiff purchased the mortgaged property at public sale she took it subject to the taxes then a lien thereon as well as those subsequently accruing. *Fredin v Cascade Realty*, 205 M 256, 285 NW 615.

Withholding confirmation of foreclosure sale because of inadequacy of price. 17 MLR 821.

**581.09 SATISFACTION OF JUDGMENT; EXECUTION FOR DEFICIENCY.**

Under the circumstances stated in the opinion, a contract for construction by the plaintiff of the exterior superstructure of a new courthouse being built by defendant cannot be construed as requiring the defendant to secure a bond for plaintiff's protection from a third party who was to furnish the stone for said superstructure. In any event, the evidence amply supports a finding that plaintiff waived the giving of such bond. Plaintiff is not entitled to the benefit of the recognized exception to the stated rule which applies in cases where a party has refused to

**581.10 MORTGAGE FORECLOSURE BY ACTION**

1384

complete his contract because of unforeseen and substantial difficulties encountered in the performance thereof, it appearing that the difficulty which arose after performance of the contract was undertaken by plaintiff was anticipated by him before he made the contract. *Zimmerman v County of Rice*, 202 M 54, 277 NW 360.

See, *Wagner v Bankers Life Co.* 206 M 118, 288 NW 1, noted under section 581.08.

Where plaintiff brought and tried his cause as one founded in tort and not upon contract but failed to establish it upon that theory, court properly directed a verdict against him. *Tapper v Pliam*, 212 M 295, 3 NW(2d) 500.

In actions to foreclose mechanics' liens or mortgages, ordinarily personal judgment may not be entered against a defendant found personally liable for the debt until the lien rights covered by the judgment have first been exhausted by foreclosure sale. In such foreclosure actions, the court retains jurisdiction after the entry of judgment and after the time to appeal therefrom has expired for the purpose of supervising and controlling the foreclosure sale, and in the exercise of such control may permit a lien claimant to waive completely worthless lien rights included in such judgment and order entry of personal judgment against a defendant personally liable for the debt without first requiring a foreclosure sale. *Smude v Amidon*, 214 M 266, 7 NW(2d) 776.

**581.10 REDEMPTION BY MORTGAGOR, CREDITOR.**

A real estate mortgage is a lien; and when a prior lien is foreclosed, a junior lienholder, whether in the form of a mortgage or judgment, has a right of redemption. This is wholly a statutory right and strictly regulated by statute. The defendants in redeeming from the second mortgage foreclosure sale, did not conspire to defraud the judgment creditor. *Krahmer v Koch*, 216 M 421, 13 NW(2d) 370.

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

Sale of right of possession during period of redemption. 10 MLR 440.

Constructive trust upon redemption by creditor. 17 MLR 344.

**581.11 DELIVERY OF POSSESSION.**

Purchaser's right to crops growing on mortgaged land at time of foreclosure and sale. 13 MLR 717.

**581.12 STRICT FORECLOSURE.**

Strict foreclosure of land contracts. 14 MLR 342.

Emergency, moratorium legislation under L. 1933, c. 339. 18 MLR 55.

Strict foreclosure. 23 MLR 388.