GENERAL STATUTES

OF THE

STATE OF MINNESOTA

IN FORCE

JANUARY 1, 1889.

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VOL. 2.

SUPPLEMENT, 1879-1888,

WITH

ANNOTATIONS AND GENERAL INDEX TO BOTH VOLUMES.

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§ 49. (Sec. 48.) Writ—When returnable—Seal.

A writ of *habeas corpus* issued by a court commissioner under his own hand and seal, but without the seal of the court, is void. State v. Barnes, 17 Minn. 340, (Gil. 315.)

CHAPTER 81.

FORECLOSURE OF MORTGAGES.

TITLE 1.

FORECLOSURE BY ADVERTISEMENT.*

*§ 1. Foreclosure by advertisement—Limitation.

Every mortgage of real estate, heretofore or hereafter executed, containing therein a power of sale, upon default being made in any condition of such mortgage, may be foreclosed by advertisement within fifteen years after the maturing of such mortgage or the debt secured thereby, in the cases and in the manner hereinafter specified. (1878, c. 53, § 1, *as amended* 1879, c. 21, § 1.)

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

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

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

*§ 2. Prerequisites to such foreclosure.

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

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

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

What error in the record will defeat the foreclosure, see Thorp v. Merrill, 21 Minn. 336.

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

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

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

*§ 3. Foreclosure for installments.

This section only authorized a separate foreclosure for installments falling due subsequent to the first installment of indebtedness secured by a mortgage, and the foreclosure under such chapter, for the first installment of mortgage indebtedness, is void. Shorts v. Cheadle, 8 Minn. 67, (Gil. 44.) Where a mortgage, payable in installments, was foreclosed for the first installment, and the owner of the land redeemed from that

* See curative acts, *infra*, c. 123.

TITLE 3.

WRIT OF HABEAS CORPUS.

See State v. Buckham, 29 Minn. 462, 463, 13 N. W. Rep. 902; In re Snell, 31 Minn. 110, 16 N. W. Rep. 692.

§ 23. (Sec. 22.) Application—To whom made.

The statute conferring on judges of the supreme court power to allow writs of *habeas corpus* is constitutional. State v. Grant, 10 Minn. 39, (Gil. 22.)

The supreme court has original jurisdiction of the writ. A prisoner bound over and committed by a justice of the peace, who sues out a writ of *habeas corpus* from this court, may have a *certiorari* as ancillary thereto, to bring up the testimony received by the justice and by him returned to the district court and there filed. In re Snell, 31 Minn. 110, 16 N. W. Rep. 692.

A court commissioner may allow a writ of *habeas corpus*, returnable before himself, to issue to his own county, or to an adjoining county, where there is, in such adjoining county, no officer authorized to grant such writ. State v. Hill, 10 Minn. 63, (Gil. 45.)

A decision of one court or officer upon a writ of *habeas corpus*, refusing to discharge a prisoner, is not a bar to the issue of another writ, based upon the same state of facts as the former writ, by another court or officer, or to a hearing or discharge thereupon. In re Snell, 31 Minn. 110, 16 N. W. Rep. 692. Distinguished, State v. Bechdel, 34 N. W. Rep. 334.

As to power of district judge to reverse the decision of a court commissioner in proceedings on *habeas corpus*, see State v. Bechdel, (Minn.) 37 N. W. Rep. 338.

§ 24. (Sec. 23.) Application in another county.

A court commissioner may allow a writ of *habeas corpus*, returnable before himself, to issue to his own county, or to an adjoining county, if there be no officer therein authorized to allow such writ. State v. Hill, 10 Minn. 63, (Gil. 45.)

§ 34. (Sec. 33.) Return of writ—Proceedings.

A judge of a district court has power to allow a writ of *habeas corpus* returnable before himself at chambers. Savage v. Hill, 10 Minn. 63, (Gil. 45.)

See note to § 23, *supra*.

The title of the justice issuing the commitment to hold his office cannot be questioned on *habeas corpus*. Ex parte Johnson, (Neb.) 19 N. W. Rep. 594.

Where a prisoner waives his right to a jury trial under a statute permitting such waiver, and is afterwards convicted, the validity of such statute and waiver may be tested on *habeas corpus*. In re Staff, (Wis.) 23 N. W. Rep. 587.

See In re Finlen, (Nev.) 18 Pac. Rep. 827.

§ 35. (Sec. 34.) Discharge—When granted.

A person charged with crime and held to bail by the magistrate after examination, ought not to be discharged, if the magistrate had jurisdiction, and there is evidence reasonably tending to support his determination. State v. Hayden, 35 Minn. 283, 28 N. W. Rep. 659.

It is only when the judgment is not authorized by law under any circumstances in the particular case made by the pleadings, whether the trial has proceeded regularly or otherwise, that it can be said to be void, so as to justify the discharge of the defendant in custody thereunder. State v. Sloan, (Wis.) 27 N. W. Rep. 616. And see State v. Orton, (Iowa,) 25 N. W. Rep. 775; Willis v. Bayles, (Ind.) 5 N. E. Rep. 8; Holderman v. Thompson, (Ind.) Id. 175; U. S. v. Patterson, 29 Fed. Rep. 775.

§ 43. (Sec. 42.) Traverse of return—Allegation of new matter.

See State v. Sheriff, 24 Minn. 87, 90.

§ 46. (Sec. 45.) Re-arrest.

A discharge for defect of proof merely terminates the proceeding, so that he cannot be prosecuted except by a new proceeding instituted on sufficient evidence given therein. State v. Holm, 34 N. W. Rep. 748. The complaint and warrant for re-arrest need not be any different from what they would be if there had been no prior arrest and discharge. Id.

See In re Snell, 31 Minn. 110, 113, 16 N. W. Rep. 692.

foreclosure, the redemption merely annulled the sale for that installment, leaving the mortgage to stand, as to the other installments, as though the first installment had been paid, and the mortgagee may foreclose for such subsequent installments. Daniels v. Smith, 4 Minn. 172, (Gil. 117.)

Where a mortgage is payable by installments, and the mortgagee has foreclosed and sold the property for one installment, he still retains a lien on the land for the installments not due, and may, as they successively become due, foreclose and sell the same land for as many times as there are installments. Watkins v. Hackett, 20 Minn. 106, (Gil. 92.)

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

*§ 4. Same—Manner of sale.

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

*§ 5. Notice of sale.

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

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

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

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

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

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

Where a foreclosure by advertisement is made upon an illegal notice of sale, the mortgagor may have the sale set aside, or he may recover damages against the mortgagee for the injury he has suffered by the unauthorized sale. Lowell v. North, 4 Minn. 32, (Gil. 15.) That the sale was upon illegal notice; that in consequence thereof the property sold for less than its value; and that, had the sale been duly made, the property would have brought sufficient to satisfy the mortgage debt,—show a right to recover by the mortgagor, and, when pleaded in a suit by the mortgagee to recover a deficiency left after the sale, constitute a good defense. It is no answer to the mortgagor's defense that he might redeem. Id. The allegation that the notice of sale was not published in a newspaper printed in the county where the mortgaged premises were situated, nor in the nearest paper in one of the adjoining counties, sufficiently shows that the sale was illegal. Id.

Publication in religious newspapers. Hull v. King, (Minn.) 37 N. W. Rep. 792.

See Coles v. Yorks, 28 Minn. 464, 467, 10 N. W. Rep. 775.

*§ 6. Requisites of notice of sale.

Every notice shall specify—

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

Second. The date of the mortgage, and when and where recorded.

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

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

Fifth. The time and place of sale. (1878, *c.* 53, § 6, *as amended* 1883, *c.* 24, § 1.)

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

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

SUBD. 3. In stating the amount claimed to be due in the notice of sale, an excess of trifling amount, arising from a mere error of computation, would not be deemed material; but if the amount claimed is largely in excess of what the terms of the contract or any legitimate calculation based thereon will justify, the sale will be void. Spencer v. Annan, 4 Minn. 542, (Gil. 426.) Where a notice of sale under a power in a mortgage claims to be due more than is actually due, if the excess is not of sufficient magnitude to have influenced purchasers, the sale will not be set aside for that reason. Ramsey v. Merriam, 6 Minn. 168, (Gil. 104.) The omission to date a notice of sale, under the power in a mortgage, does not vitiate the sale. Id. In the absence of fraud in law or fact, or of actual injury, the claim in the notice of foreclosure sale of more than is legally due, or stipulated for in the contract, does not invalidate the foreclosure. In this case an excess of $7,335.64 in a claim of $34,251.28 was held not to invalidate the foreclosure. Butterfield v. Farnham, 19 Minn. 85, (Gil. 58.)

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

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

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

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

*§ 7. Manner of conducting sale.

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

*§ 8. Postponement of sale.

A mortgage sale, under the power, may, before the day advertised for the sale, be postponed to another day. Bennett v. Brundage, 8 Minn. 432, (Gil. 385.)

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

*§ 9. Sale of separate tracts.

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

Upon foreclosure of a mortgage, under a power of sale in it, authorizing a sale of the whole property on default, a sale of the whole is regular, though a sale of less than the whole might satisfy the debt. Johnson v. Williams, 4 Minn. 260, (Gil. 183.) But where the value of the whole property greatly exceeds the amount of the debt, a court of equity will, on application of the mortgagor, or his representatives, confine the sale to such part of the land as will be sufficient to satisfy the debt. Id.

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

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

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

*§ 10. Mortgagee may purchase.

Where, in foreclosure of a mortgage under a power, the sale is made by the sheriff or any third person, the mortgagee may, under § 9, c. 75, Comp. St., become the purchaser; not otherwise. Ramsey v. Merriam, 6 Minn. 168, (Gil. 104;) Allen v. Chatfield, 8 Minn. 435, (Gil. 386.)

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

*§ 11. Certificate of sale—Acknowledgment and record.

[See curative acts, *post*, c. 123.]

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

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

*§ 13. Redemption by mortgagor.

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

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

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

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

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

A junior mortgagee is not an "assign." Cuilerier v. Brunelle, 33 N. W. Rep. 123. See note to § 18, *post*.

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

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

*§ 14. Redemption—How made.

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

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

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

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

Within twenty-four hours after such redemption is made, the party redeeming shall cause the documents so required to be produced to be filed in the office of the register of deeds of the county in which the mortgaged lands are situated, and the register of deeds shall indorse thereon the date and hour of receiving the same, and shall preserve such documents in his office for one year thereafter, for which service he shall be entitled to receive one dollar: *provided*, that in case such redemption shall be made at any place other than the county seat, it shall be deemed a sufficient compliance herewith to forthwith deposit such documents in the nearest post-office, addressed to such register of deeds, with the postage thereon prepaid. (1878, *c.* 53, § 14, *as amended* 1881, *Ex. Sess. c.* 3, § 1.)

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

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

The sheriff, in receiving money paid on redemption, acts as the officer of the law, not as the agent of the party. Horton v. Maffitt, 14 Minn. 289, (Gil. 217.)

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

*§ 16. Redemption by creditors.

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

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

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

The rule in Pamperin v. Scanlan, 28 Minn. 345, 9 N. W. Rep. 868, as to redemption by subsequent incumbrancers, followed. Parke v. Hush, 29 Minn. 434, 13 N. W. Rep. 668.

See, also, Tinkcorn v. Lewis, cited in notes to *c.* 66, §§ 323, 325; Martin v. Sprague, 29 Minn. 53, 11 N. W. Rep. 143; Sprague v. Martin, 29 Minn. 226, 229, 13 N. W. Rep. 34.

*§ 18. Surplus—Disposition.

A second mortgagee, in preference to the mortgagor, is entitled to receive the surplus money arising from the foreclosure sale under a prior mortgage. Brown v. Crookston Agricultural Ass'n, 34 Minn. 545, 26 N. W. Rep. 907.

A junior mortgagee is an "assign" within the meaning of this section. Fuller v. Langum, 33 N. W. Rep. 122. See note to section 13, *supra*.

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

*§ 19. Perpetuating evidence of publication and sale.

[See curative acts, *post*, *c.* 123.]

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

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

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

*§ 23. Affidavit of costs.

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

*§ 24. Recovery of excessive costs, etc.

The action given by this section may be brought as soon as the property is in fact sold on the foreclosure, without waiting for the expiration of the time to redeem. Laws 1879, *c.* 66, (*ante*, *c.* 23, § 1 *et seq.*,) does not repeal § 24. Beal v. White, 28 Minn. 6, 8 N. W. Rep. 829.

*§ 25. Foreclosure by foreign executors, etc.

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

*§ 26*a*. Sheriff's certificate of sale as evidence—Limitation.

That the sheriff's certificate of any sale, heretofore or hereafter made, under a power to sell contained in a mortgage, shall be *prima facie* evidence that all the requirements of law in that behalf have been duly complied with, and *prima facie* evidence of title in fee thereunder in the purchaser at such sale, his heirs or assigns, after the time for redemption therefrom has expired; and no such sale shall be held invalid or set aside by reason of any defect in the notice thereof, or in the publication or posting of such notice, or in the proceedings of the officer making such sale, unless the action in which the validity of such sale shall be called in question be commenced, or the defense alleging its invalidity be interposed, within five years after the date of such sale: *provided*, that persons under disability to sue by reason of being minors, insane persons, idiots, persons in captivity, or in any country with which the United States are at war, when such sale was made, may commence such action or interpose such defense at any time within five years after the removal of such disability: *provided*, *further*, that such actions shall be commenced with reasonable diligence in all cases. (1883, *c.* 112, § 1.*)

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

The certificate, to be evidence, must conform in matters of substance to the requirements of the statute. Nelson v. Central Land Co., 35 Minn. 408, 29 N. W. Rep. 121.

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

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

TITLE 2

FORECLOSURE BY ACTION.

§ 29. (Sec. 26.) Judgment—Contents.

The confirmation of a report of sale has the effect of a judgment, and cannot be attacked collaterally. Hotchkiss v. Cutting, 14 Minn. 537, (Gil. 408.)

See Dodge v. Allis, cited in note to § 36, *infra*.

§ 31. (Sec. 28.) Purchase by mortgagee.

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

A mortgagee, foreclosing under the power, can become the purchaser only where the sale is made by the sheriff or other officer named in the statute. Allen v. Chatfield, 8 Minn. 435, (Gil. 386.)

§ 32. (Sec. 29.) Report of sale.

The district court has no authority to order a resale of the premises until the coming in of the report of sale, and the objection that it has ordered a resale before the coming

* Took effect from and after September 1, 1883. Id. § 2.

in of such report may be urged in the appellate court in the first instance. Gilman v. Holyoke, 14 Minn. 138, (Gil. 104.)

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

§ 33. (Sec. 30.) Execution for deficiency.

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

§ 34. (Sec. 31.) Redemption by mortgagor, etc.—By creditor.

The mortgagor, or those claiming under him, shall have one year after the date of the order of confirmation, in which to redeem the premises sold, or any separate portion thereof, by paying the amount bid therefor, with interest thereon from the day of sale; and judgment or other lien creditors may redeem in the order and manner specified in title one of this chapter: *provided*, that no creditor shall be entitled to redeem, unless, within the year allowed for redemption, he files notice of his intention to redeem, in the office of the district clerk where the judgment is entered. (*As amended* 1883, c. 25, § 1.)

Under § 1, c. 87, Laws 1860, a mortgagor, his heirs or assigns, could redeem, from a sale on foreclosure, not only within three years from the day of sale, but within three years from the time of filing notice of such sale in the office of the register of deeds. Thompson v. Foster, 21 Minn. 319. § 1, c. 87, Laws 1860, construed, and held, that the time within which a redemption might be made under such section from foreclosure sale, commenced to run from the filing of the notice of such sale in the office of the register of deeds. Id.

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

§ 36. (Sec. 33.) Final decree.

An appeal may be taken, as from a judgment, from the "final decree," in an action to foreclose a mortgage entered pursuant to § 36. Upon such appeal no alleged error in the judgment directing a sale under § 29, can be reviewed. To obtain a review of that judgment, an appeal must be taken from it. Dodge v. Allis, 27 Minn. 376, 7 N. W. Rep. 732.

Irregularities in making sale are not available upon an application after final decree, to set aside the sale, decree of confirmation, and final decree, unless sufficient excuse is shown for failure to present them in opposition to an application to confirm the sale. Coles v. Yorks, 36 Minn. 388, 31 N. W. Rep. 353.

*§ 43. Strict foreclosure.

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

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

See, also, Wilder v. Haughey, 21 Minn. 101.

ATTORNEY'S FEES IN FORECLOSURE.

See Coles v. Yorks, 28 Minn. 464, 466, 10 N. W. Rep. 775.