

1934 Supplement
To
Mason's Minnesota Statutes
1927

(1927 to 1934)
(Superseding Mason's 1931 Supplement)

Containing the text of the acts of the 1929, 1931, 1933 and 1933-34 Special Sessions of the Legislature, both new and amendatory, and notes showing repeals, together with annotations from the various courts, state, federal, and the opinions of the Attorney General, construing the constitution, statutes, charters and court rules of Minnesota



Edited by

WILLIAM H. MASON, Editor-in-Chief
W. H. MASON, JR. }
R. O. MASON } Assistant Editors
J. S. O'BRIEN }

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CHAPTER 83

Foreclosure of Mortgages

BY ADVERTISEMENT

9602. Limitation.

After foreclosure sale remedy on mortgage as a security is exhausted and assignment in mortgage of rents to pay taxes was terminated. *Gardner v. W.*, 185M147, 240NW351. See Dun. Dig. 6465.

After foreclosure sale rights of parties are determined exclusively by statute. *Gardner v. W.*, 185M147, 240NW351. See Dun. Dig. 6371.

Purchaser at mortgage sale is not entitled to rents accruing during the period allowed for redemption to pay taxes subject to which he bid in the property, though the mortgage expressly assigned rents to pay taxes. *Gardner v. W.*, 185M147, 240NW351. See Dun. Dig. 6371.

1. Foreclosure in general.

The measure of a mortgagor's damage for a premature foreclosure 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. B.*, 185M35, 239NW774. See Dun. Dig. 6476.

13. Regulation by executive order.

Federal land bank of St. Paul is not excepted from governor's order as to mortgage foreclosures. *Op. Atty. Gen.*, Mar. 24, 1933.

Governor's executive order did not affect time of redemption from foreclosure sales held prior to its issuance. *Op. Atty. Gen.*, Mar. 27, 1933.

Governor's executive order does not protect mortgagor who has parted with title to land, though he continues to reside thereon. *Op. Atty. Gen.*, Mar. 27, 1933.

Under governor's executive order, mortgagor could not consent to a foreclosure of mortgage. *Op. Atty. Gen.*, Mar. 27, 1933.

9603. Requisites for foreclosure.

½. In general.

Finding that interest had been paid and that no default had occurred held sustained by the evidence. 171M469, 214NW472.

An agent to collect interest is within his authority in receiving the interest one day before it is due to be applied as of the date it is due. 171M469, 214NW472.

Mortgage foreclosure was not abandoned by reason of an agreement between mortgagee and mortgagor that latter might purchase on contract for a certain sum if there was no redemption. *Investors' Syndicate v. H.*, 186M599, 244NW65. See Dun. Dig. 6150 to 6156.

3. Only record owner may foreclose.

Necessity for recording assignment of mortgage given under "Federal Farm Loan Act" (Mason's Code, Title 12, §§641 to 1021), see *Laws 1929, c. 325*.

9604. Notice of sale—Service on occupant.

2. Service on occupant.

Foreclosure was invalid where notice was not served on occupant. 172M183, 214NW925.

Where notice of foreclosure and sale was served upon the tenant holding the entire farm under lease from the owner, failure to serve also those who owned and occasionally used a hunter's cabin on the premises did not invalidate the foreclosure. 174M47, 218NW446.

Governor's executive order relating to foreclosure sales does not prohibit serving notice on occupant in foreclosure proceedings. *Op. Atty. Gen.*, Mar. 22, 1933.

9606. Attorney to foreclose—Record of power.

So long as no attorney's fees are included as a charge against the mortgagor, it is not necessary to make and file a power of attorney. 176M609, 224NW264.

Foreclosure sale by advertisement made before power of attorney is recorded, held void; and action to set aside commenced within seven months is not barred by laches, and doctrines of estoppel and unjust enrichment were not applicable. 181M79, 231NW395.

Attorney's fees cannot be charged as costs unless an attorney at law is employed. 181M254, 232NW318. See Dun. Dig. 6425.

9607. Sale, how and by whom made.

6. Inverse order of alienation.

Where owner gives mortgage and thereafter conveys away part of land, one who obtains judgment lien upon part retained has no right to require that tract conveyed away be first sold on foreclosure of mortgage. 175M541, 222NW71.

10. In general.

Mortgagor in possession of real estate cannot consent to foreclosure sale in violation of governor's executive order. *Op. Atty. Gen.*, Mar. 22, 1933.

9608. Postponement.

Executive order issued by Governor directing sheriffs to refrain from conducting mortgage foreclosure sales was an attempt to exercise legislative power and not within his power. *State v. Moeller*, 249NW330.

Adjournment of mortgage foreclosure sale by sheriff on February 27, 1933, was validated by curative provision of act of Mar. 2, 1933. *Id.*

9610. Foreclosure for installments, etc.

34F(2d)308. Appeal dismissed. 51SCR40.

The amendment of 1925, permitted foreclosure for default in one installment due under a mortgage, gave validity to a provision for such foreclosure in a pre-existing mortgage, and such construction of the statute does not deny the mortgagor due process of law or impair the obligation of his contract. 34F(2d)308.

One having taken an assignment of a mortgage under a foreclosure under the 1925 act amending this section cannot claim that the subsequent installments are not prior to his title, on the ground that the 1925 act was unconstitutional as to mortgages executed prior to its passage. 174M520, 219NW914.

Where junior mortgagee redeemed from foreclosure by advertisement because of default in payment of installment, notice being given of amount thereof, principal debt had priority over redemptioner. *Des Moines Joint Stock Land Bank v. D.*, 185M435, 241NW393. See Dun. Dig. 6423.

After foreclosure of mortgage on installment, mortgage and all its covenants, including that to pay taxes, remain in full force, and mortgagee is entitled under assignment of rents as part of security to collect rents to apply upon delinquent taxes, even those accrued at time of foreclosure for installment. *Peterson v. M.*, 248NW667. See Dun. Dig. 9610.

9612. Mortgagee, etc., may purchase.

Fraudulent grantee can purchase and acquire good title against all creditors at foreclosure of a prior and paramount mortgage. 171M197, 213NW892.

Where mortgagee foreclosed and purchased for the amount due on note, there was no "collection" within the meaning of assignment of half interest in the debt secured, and assignee was only entitled to half interest in the land and not a money judgment. 178M360, 227NW182.

9613. Certificate of sale—Record—Effect.

4½. Assignment.

180M552, 231NW234.

It is the duty of the sheriff to sign the certificate of sale regardless of what is stated in the affidavit of cost with which he had no concern. *Op. Atty. Gen.*, Jan. 2, 1932.

12. Right to crops, rents and profits.

Where premises are falling into disrepair, but are used in usual course of husbandry as in previous years, purchaser at a mortgage sale is not entitled to a receiver to apply rents to repairs during year of redemption. *Greene v. T.*, 246NW921. See Dun. Dig. 6457(40).

12½. Taxes.

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. *Greene v. T.*, 246NW921. See Dun. Dig. 6457(40).

9620. Affidavit of costs.

Attorney's fees cannot be charged as costs unless an attorney at law is employed. 181M254, 232NW318. See Dun. Dig. 6425.

9621. Excessive costs or interest.

If mortgagee charges as a disbursement a sum which is not actually paid, the mortgagor or his heirs or assigns may recover from the owner of the mortgage at the time of foreclosure three times the amount of any such sum, but the foreclosure would be valid. *Op. Atty. Gen.*, Jan. 2, 1932.

9623. Action to set aside for certain defects.

Where administrator forecloses mortgage and buys in his own name as administrator, an action to set aside the foreclosure and sale on ground that no default had occurred is properly brought in the district court and against the administrator as sole defendant. 171M469, 214NW472.

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. *Shearsgreen Holding Co. v. D.*, 182M142, 233NW853. See Dun. Dig. 6487.

9626. Redemption by mortgagor.

A mortgagor is not deprived of his right of redemption by foreclosure sale alone as it continues for a year after sale. *Brown v. B.*, 185M35, 239NW774. See Dun. Dig. 6381a(65).

4. How lost.

Strict legal rights in respect to the time for redemption from foreclosure sale may be waived. *Ellingson v. S.*, 182M510, 234NW867. See Dun. Dig. 6400.

The detriment which results to mortgagor from his omission to make redemption in reliance on the mortgagee's promise that redemption may be made at a later date, is sufficient consideration for that promise. *Ellingson v. S.*, 182M510, 234NW867. See Dun. Dig. 1750(81), 6400.

12. Who is an assign.

During year allowed by statute either a life tenant or remainderman could have redeemed, and the rights of both were extinguished by failure to redeem. *Thielen v. S.*, 184M333, 238NW678. See Dun. Dig. 6399.

15. By wife.

Where wife, on divorce, was given possession of apartment building and permitted mortgage to be foreclosed and had attorney take judgment against her and redeem property for purpose of defrauding divorced husband, such attorney held property as trustee for divorced couple, subject to prior lien for amount paid in redemption. *Slagle v. S.*, 187M1, 244NW79. See Dun. Dig. 9598, 9607.

16. Time in which to redeem—Extension.

In action to enforce agreement to extend time for redemption, evidence held to support finding for defendants. 172M422, 215NW839.

18. Effect of non-redemption.

Crop not harvested until a short time after expiration of year for redemption held, nevertheless, the property of the tenant and the mortgagor. 176M37, 222NW292.

Where an award of damages is made to the owner of a tract of land on establishment of a county road, upon which land a mortgage was in process of foreclosure, the mortgagee who purchased the property was entitled to the award in the absence of a redemption. *Op. Atty. Gen.*, Apr. 2, 1931.

9627. Redemption by creditor.**1. General plan.**

Evidence held to sustain a finding of agreement that third mortgagee would redeem from first and lease land to mortgagor. 174M180, 218NW889.

Holder of second mortgage could sue for breach of condition of bond and recover damages for impairment or loss of his security without redeeming from foreclosure of first mortgage. 176M26, 222NW532.

The purchaser at the sale, having failed to file an affidavit of taxes paid, they did not become a part of the sum to be paid in making redemption. 176M393, 223NW 609.

2. Who may redeem.

Slagle v. S., 187M1, 244NW79; note under §9626. Divorced wife having right to redeem as creditor of husband in her individual capacity, the fact that she made redemption for herself and also for her child did not render the redemption invalid. 176M393, 223NW609.

Judgment in divorce action making allowance for support of children, a lien upon real estate gave the divorced wife the right to redeem from a sale of the land under a mortgage. 176M393, 223NW609.

A life tenant whose right to redeem from mortgage foreclosure has been extinguished cannot question the right of redemption of one creditor from another. *Thielen v. S.*, 184M333, 238NW678. See Dun. Dig. 6411.

Where mortgage was foreclosed and neither life tenant nor remaindermen redeemed, and creditor of life tenant redeemed, a junior mortgage creditor of one of the remaindermen could redeem from the judgment creditor. *Thielen v. S.*, 184M333, 238NW678. See Dun. Dig. 6410(48).

9628. Redemption, how made.

Affidavit of amount due properly stated entire amount covered by affiant's lien. 176M393, 223NW609.

½. In general.

A redemption by a junior mortgagee operates as an assignment of the rights of a purchaser at a real estate foreclosure sale by advertisement, and the redemptioner is subrogated to such rights. *Des Moines Joint Stock Land Bank v. D.*, 185M435, 241NW393. See Dun. Dig. 6423(54).

9629. Certificate of redemption—Record.

Failure to record redemption certificate within four days, rendered it void as to subsequent good-faith redemption from sheriff. 177M563, 225NW815.

An action for money had and received did not lie to recover money paid to purchaser at foreclosure, but owner could recover from such purchaser, money received by the latter from the sheriff on a subsequent redemption by a creditor who was entitled to the land because the owner failed to file his certificate. 177M 563, 225NW815.

9630. Effect of redemption.**½. In general.**

Redeeming life tenant holds for joint benefit of himself and remainderman. 171M182, 213NW736.

Amount which remainderman must contribute. 171M 182, 213NW736.

Evidence held to sustain a finding of agreement that third mortgagee would redeem from first and lease land to mortgagor. 174M180, 218NW889.

1. Redemption by owner.

Slagle v. S., 187M1, 244NW79; note under §9626.

9632. Holder of junior mortgage may pay.

Plaintiff, mortgagee, by releasing the mortgagors from their personal obligation to pay the mortgage, did not subordinate its mortgage to another mortgage obtained from a subsequent purchaser of the premises. 178M50, 226NW189.

The equities of mortgagees, as to each other, in respect to taxes paid or purchased by them, are not affected by the statute. *Des Moines Sav. Bk. & Trust Co. v. E.*, 183M46, 235NW390.2 See Dun. Dig. 6236.

9633. Mortgages to be reinstated in certain cases.

178M50, 226NW189.

After foreclosure sale remedy on mortgage as a security is exhausted and assignment in mortgage of rents to pay taxes was terminated. *Gardner v. W.*, 185M147, 240NW351. See Dun. Dig. 6465.

After foreclosure sale rights of parties are determined exclusively by statute. *Gardner v. W.*, 185M147, 240NW 351. See Dun. Dig. 6371.

Purchaser at mortgage sale is not entitled to rents accruing during the period allowed for redemption to pay taxes subject to which he bid in the property, though the mortgage expressly assigned rents to pay taxes. *Gardner v. W.*, 185M147, 240NW351. See Dun. Dig. 6371.

CURATIVE ACTS

Laws 1929, c. 5

Laws 1929, c. 53.

Laws 1929, c. 325.

Laws 1929, c. 378.

Laws 1931, c. 198.

Laws 1931, c. 199.

Laws 1931, c. 230.

Laws 1931, c. 237.

Laws 1933, c. 437. See Appendix 5, par. 21, post.

Act. Ex. Ses., Dec. 27, 1933, c. 26, legalizes foreclosure by advertisement of mortgage or assignment thereof to banking corporation where defect consisted in omitting word "The" from corporate name.

Act. Jan. 5, 1934, Ex. Ses., c. 42, validates foreclosures by advertisement theretofore made in which power of attorney was not executed and/or recorded prior to sale. Omitted as temporary.

EMERGENCY RELIEF ACT

9633-1. Application of Act.—The provisions of this Act shall not apply to any mortgage while such mortgage is held by the United States or by any agency, department, bureau, board or commission thereof, as security or pledge of the maker, its successors or assigns, nor shall the provisions of this Act apply to any mortgage held as security or pledged to secure payment of a public debt or to secure payment of the deposit of public funds.

The following sections of this Act preceding Part Two shall constitute Part One. (*Act Apr. 18, 1933, c. 339.*)

Preable to following act.

Whereas, the severe financial and economic depression existing for several years past has resulted in extremely low prices for the products of the farms and the factories, a great amount of unemployment, an almost complete lack of credit for farmers, business men and property owners and a general and extreme stagnation of business, agriculture and industry, and

Whereas, many owners of real property, by reason of said conditions, are unable, and it is believed, will for some time be unable to meet all payments as they come due of taxes, interest and principal of mortgages on their properties and are, therefore, threatened with loss of such properties through mortgage foreclosure and judicial sales thereof, and

Whereas, many such properties have been and are being bid in at mortgage foreclosure and execution sales for prices much below what is believed to be their real values and often for much less than the mortgage or judgment indebtedness, thus entailing deficiency judgments against the mortgage and judgment debtors, and

Whereas, it is believed, and the Legislature of Minnesota hereby declares its belief, that the conditions existing as hereinbefore set forth has created an emergency of such nature that justifies and validates legislation for the extension of the time of redemption from mortgage foreclosure and execution sales and other relief of a like character; and

Whereas, the State of Minnesota possess the right under its police power to declare a state of emergency to exist, and

Whereas, the inherent and fundamental purposes of our government is to safeguard the public and promote the general welfare of the people; and

Whereas, under existing conditions the foreclosure of many real estate mortgages by advertisement would prevent fair, open and competitive bidding at the time of sale in the manner now contemplated by law, and

Whereas, it is believed, and the Legislature of Minnesota hereby declares its belief, that the conditions existing as hereinbefore set forth have created an emergency of such a nature that justifies and validates changes in legislation providing for the temporary manner, method, terms and conditions upon which mortgage foreclosure sales may be had or postponed and jurisdiction to administer equitable relief in connection therewith may be conferred upon the District Court, and

Whereas, Mason's Minnesota Statutes of 1927, Section 9608, which provides for the postponement of mortgage foreclosure sales, has remained for more than thirty years, a provision of the statutes in contemplation of which provisions for foreclosure by advertisement have been agreed upon.

Laws 1933, c. 399, is valid. *Blaisdell v. H.*, 249NW334. This act is constitutional. *Blaisdell v. H.*, 249NW893. Aff'd —US—, 54SupCtRep231.

Act is not applicable to mortgages held by reconstruction finance corporation and regional agricultural credit corporation, either as mortgages or as collateral security for loans. Op. Atty. Gen., June 10, 1933.

PART ONE

9633-2. Emergency declared to exist.—In view of the situation hereinbefore set forth, the Legislature of the State of Minnesota hereby declares that a public economic emergency does exist in the State of Minnesota. (Act Apr. 18, 1933, c. 399, §1.)

9633-3. Mortgagee may apply to District Court for relief.—In any proceedings heretofore commenced for the foreclosure of a mortgage on real estate by advertisement, in which a sale of the property has not been had, or in any such proceedings hereafter commenced, when the mortgagor, or the owner in possession of the mortgaged premises, or anyone claiming under said mortgagor, or anyone liable for the mortgage debt, at any time after the issuance of the notice of such foreclosure proceedings, shall apply to the District Court of the county wherein such foreclosure proceedings are being had, or are pending, by filing and serving a summons and verified complaint with prayer that the sale in foreclosure by advertisement shall be postponed and that the foreclosure, if any, shall proceed by action. If it appears to the court that granting of the relief as prayed would be equitable and just, then, and in that event, the foreclosure proceedings by advertisement may be postponed by the court by an ex parte order which shall be served with the summons and complaint upon the party foreclosing or his attorney and at the time of the hearing upon such order, the court may then further postpone such sale, and the parties seeking to foreclose such mortgage shall proceed, if at all, to foreclose said mortgage by interposing a cross complaint in such action. Such service may be made as now provided for the service of a summons in a civil action, or by registered mail on the person foreclosing or his authorized agent or attorney at the last known address of such person, agent or attorney respectively. As a condition precedent to such postponement of such foreclosure sale by advertisement the party filing such verified complaint shall pay to the clerk for the person foreclosing the mortgage the expenses incurred not including attorney's fees which may accrue prior to any postponement. The filing of such verified complaint shall be deemed a waiver of publication of notice of postponement of the foreclosure sale and the sale at the time which may be fixed by the court shall be deemed to be a sale postponed in lieu of the time of sale specified in the published notice of mortgage foreclosure sale. (Act Apr. 18, 1933, c. 399, §2.)

Statute held valid as extending period of redemption from foreclosure of mortgages on land not homestead. *Grace v. L.*, 249NW672.

9633-4. Court may order resale.—When any mortgage has been foreclosed by action, the court shall, on the coming in of the report of sale, cause notice of a hearing thereon to be served on the parties to the action who have appeared, and fix the time and place for the hearing on said report. Before granting an order confirming said sale, the court shall, if it ap-

pears upon due examination that the sale price is unreasonably and unfairly inadequate, or that justice has otherwise not been done, order a resale. If the sale is confirmed, the sheriff, or his deputy, shall forthwith execute and deliver the proper certificate of sale which shall be recorded within 20 days after such confirmation. Upon the hearing of the motion for an order confirming the sale of the premises involved in the foreclosure of mortgages by action, in case the evidence is insufficient to establish a fair and reasonable market or rental value of such property, the court shall receive any competent evidence, including evidence tending to establish the actual value of the property involved in said mortgage foreclosure proceedings, for the purpose, or purposes, for which said property is or can be used. The court shall also receive any evidence tending to show to what extent, if any, the property has decreased in actual or market value by reason of the economic conditions existing at the time of or prior to such sale.

1. Compromises.—In case the parties to any such foreclosure action shall agree in writing upon terms of compromise settlement thereof, or of composition of the mortgage indebtedness, or both, the court shall have jurisdiction and may by its order confirm and approve such settlement or composition, or both, as the case may be.

2. Jurisdiction of court.—The court shall have the same jurisdiction to postpone the enforcement of judgment by execution sale or to order resale or give other relief where such judgment is rendered in an action to collect a debt or obligation secured by a real estate mortgage, the foreclosure of which might be affected under the terms of this Act, as is conferred by this Act with regard to the mortgage. (Act Apr. 18, 1933, c. 399, §§3, 3.1, 3.2.)

9633-5. Period of redemption may be extended.—Where any mortgage upon real property has been foreclosed and the period of redemption has not yet expired, or where a sale is hereafter had, in the case of real estate mortgage foreclosure proceedings, now pending, or which may hereafter be instituted prior to the expiration of two years from and after the passage of this Act, or upon the sale of any real property under any judgment or execution where the period of redemption has not yet expired, or where such sale is made hereafter within two years from and after the passage of this Act, the period of redemption may be extended for such additional time as the court may deem just and equitable but in no event beyond May 1st, 1935; provided that the mortgagor, or the owner in possession of said property, in the case of mortgage foreclosure proceedings, or the judgment debtor, in case of sale under judgment, or execution, shall prior to the expiration of the period of redemption, apply to the district court having jurisdiction of the matter, on not less than 10 days' written notice to the mortgagee or judgment creditor, or the attorney of either, as the case may be, for an order determining the reasonable value of the income on said property, or, if the property has no income, then the reasonable rental value of the property involved in such sale, and directing and requiring such mortgagor or judgment debtor, to pay all or a reasonable part of such income or rental value, in or toward the payment of taxes, insurance, interest, mortgage or judgment indebtedness at such times and in such manner as shall be fixed and determined and ordered by the court; and the court shall thereupon hear said application and after such hearing shall make and file its order directing the payment by such mortgagor, or judgment debtor, of such an amount at such times and in such manner as to the court shall, under all the circumstances, appear just and equitable. Provided that upon the service of the notice or demand aforesaid that the running of the period of redemption shall be tolled until the court shall make its order upon such application. Provided, further, however, that if such mortgagor or judgment debtor, or personal representative, shall de-

fault in the payments, or any of them, in such order required, on his part to be done, or commits waste, his right to redeem from said sale shall terminate 30 days after such default and holders of subsequent liens may redeem in the order and manner now provided by law beginning 30 days after the filing of notice of such default with the clerk of Such District Court, and his right to possession shall cease and the party acquiring title to any such real estate shall then be entitled to the immediate possession of said premises. If default is claimed by allowance of waste, such 30 day period shall not begin to run until the filing of an order of the court finding such waste. Provided, further, that the time of redemption, from any real estate mortgage foreclosure or judgment or execution sale heretofore made, which otherwise would expire less than 30 days after the passage and approval of this Act, shall be and the same hereby is extended to a date 30 days after the passage and approval of this Act, and in such case, the mortgagor, or judgment debtor, or the assigns or personal representative of either, as the case may be, or the owner in the possession of the property, may, prior, to said date, apply to said court for and the court may thereupon grant the relief as hereinbefore and in this section provided. Provided, further, that prior to May 1, 1935, no action shall be maintained in this state for a deficiency judgment until the period of redemption as allowed by existing law or as extended under the provisions of this Act, has expired. (Act Apr. 18, 1933, c. 339, §4.)

9633-6. Court may revise and alter terms.—Upon the application of either party prior to the expiration of the extended period of redemption as provided in this Act and upon the presentation of evidence that the terms fixed by the court are no longer just and reasonable, the court may revise and alter said terms, in such manner as the changed circumstances and conditions may require. (Act Apr. 18, 1933, c. 339, §5.)

9633-7. Trial to be held within 30 days.—The trial of any action, hearing or proceeding mentioned in this Act shall be held within 30 days after the filing by either party of notice of hearing or trial, as the case may be, and such hearing or trial may be held at any general or special term, or in chambers, or during vacation of the court, and the order of the court shall be filed within 5 days after trial or hearing, no more than 5 days stay shall be granted and review by the Supreme Court may be had by certiorari, if application for the writ shall be made within 15 days after notice of such order and such writ shall be returnable within 30 days after the filing of such order. (Act Apr. 18, 1933, c. 339, §6.)

9633-8. Inconsistent laws suspended till May 1, 1935.—Every law and all the provisions thereof now in force insofar as inconsistent with the provisions of this Act, are hereby suspended until May 1st, 1935. No extension of the period for redemption nor any postponement of sale shall be ordered or allowed under this Act which would have the effect of extending the period for redemption beyond May 1, 1935. (Act Apr. 18, 1933, c. 339, §7.)

9633-9. Application of act.—This Act as to mortgage foreclosures shall apply only to mortgages made prior to the passage and approval of this Act but shall not apply to mortgages made prior to the passage of this Act which shall hereafter be renewed or extended for a period ending more than one year after the passage of this Act; neither shall this Act apply in any way which would allow a resale, stay, postponement or extension to such time that any right might be adversely affected by a statute of limitation. (Act Apr. 18, 1933, c. 339, §8.)

9633-10. Provisions separable.—The provisions of this Act are hereby declared to be severable. If one provision hereof shall be found by the decision of a court of competent jurisdiction to be invalid, such decision shall not affect the validity of the other provisions of this Act. (Act Apr. 18, 1933, c. 339, §9.)

PART TWO

9633-11. Definition.—The words "mortgagor," "mortgagee," "judgment creditor," "judgment debtor," and "purchaser," whenever used in this Act shall be construed to include the plural as well as the singular and also to include their personal representatives, successors and assigns. (Act Apr. 18, 1933, c. 339, §10.)

9633-12. Application.—Whenever the term "this Act" is referred to in that part of the bill amended so as to constitute Part One thereof, the same shall be construed as having reference only to Part One of this Act. (Act Apr. 18, 1933, c. 339, §11.)

9633-13. To apply to homesteads only.—The following, Part Two, of this Act shall apply only to real estate occupied as a home exclusively by the person seeking relief or persons dependent upon him and to farm lands used by the person seeking relief as his principal means of furnishing necessary support to such person, his family and dependents, and shall apply only to cases not entitled to relief under some valid provision of Part One of this Act. (Act Apr. 18, 1933, c. 339, Pt. 2, §1.)

The Governor's executive order prohibits foreclosure of mortgages on "real estate upon which the mortgagor has his residence," and does not prohibit foreclosure of a mortgage upon an adjacent piece of real estate though the two properties together do not exceed one-third of an acre in area and constitute the "homestead" of the mortgagor. Op. Atty. Gen., Apr. 7, 1933.

9633-14. Mortgagee may apply to District Court for relief.—In any proceedings heretofore commenced for the foreclosure of a mortgage on real estate by advertisement, in which a sale of the property has not been had, or in any such proceedings hereafter commenced, when the mortgagor, or the owner in possession of the mortgaged premises, or anyone claiming under said mortgagor, or anyone liable for the mortgage debt, at any time after the issuance of the notice of such foreclosure proceedings, shall apply to the District Court of the county wherein such foreclosure proceedings are being had, or are pending, by filing and serving a summons and verified complaint with prayer that the sale in foreclosure by advertisement shall be postponed and that the foreclosure, if any, shall proceed by action. If it appears to the court that granting of the relief as prayed would be equitable and just, then, and in that event, the foreclosure proceedings by advertisement may be postponed by the court by an exparte order which shall be served with the summons and complaint upon the party foreclosing or his attorney and at the time of the hearing upon such order, the court may then further postpone such sale, and the parties seeking to foreclose such mortgage shall proceed, if at all, to foreclose said mortgage by interposing a cross complaint in such action. Such service may be made as now provided for the service of a summons in a civil action, or by registered mail on the person foreclosing or his authorized agent or attorney at the last known address of such person, agent or attorney respectively. As a condition precedent to such postponement of such foreclosure sale by advertisement the party filing such verified complaint shall pay to the clerk for the person foreclosing the mortgage the expenses incurred not including attorney's fees which may accrue prior to any postponement. The filing of such verified complaint shall be deemed a waiver of publication of notice of postponement of the foreclosure sale and the sale at the time which may be fixed by the court shall be deemed to be a sale postponed in lieu of the time of sale specified in the published notice of mortgage foreclosure sale. (Act Apr. 18, 1933, c. 339, Pt. 2, §2.)

9633-15. Jurisdiction of court.—The court shall have the same jurisdiction to postpone the enforcement of judgment by execution sale or to order resale or give other relief where such judgment is rendered in an action to collect a debt or obligation secured by a real estate mortgage, the foreclosure of which might be affected under the terms of this Act, as is conferred

by this Act with regard to the mortgage. (Act Apr. 18, 1933, c. 339, Pt. 2, §3.)

9633-16. Application of act.—The provisions hereof shall not apply to mortgages made after the passage of this Act nor to mortgages made prior to the passage of this Act which shall hereafter be renewed or extended to become due more than a year after such passage; neither shall this Act apply in any way which would allow a resale, stay, postponement or extension to such time that any right might be adversely affected by a statute of limitation. (Act Apr. 18, 1933, c. 339, Pt. 2, §4.)

9633-17. Limitations of act.—No postponement or extension shall be ordered under conditions which, under the temporary emergency, would substantially diminish or impair the value of the contract or obligation of the person against whom the relief is sought, without reasonable allowance to justify the exercise of the police power hereby authorized. (Act Apr. 18, 1933, c. 339, Pt. 2, §5.)

9633-18. Trial to be held within 20 days.—The trial of any action, hearing or proceeding provided for in this Act shall be held within 20 days after the filing by either party of notice of hearing or trial, as the case may be, and such hearing or trial may be held at any general or special term, or in chambers, or during vacation of the court, and the order of the court shall be filed within 5 days after trial or hearing, no more than 5 days stay shall be granted within which to apply for amended findings, and order or for review and review by the Supreme Court may be had by certiorari, if application for the writ shall be made within 10 days after notice of such order and such writ shall be returnable within 30 days after the filing of such order. (Act Apr. 18, 1933, c. 339, Pt. 2, §6.)

9633-19. Provisions severable.—The provisions of this Act shall be severable. The invalidity of any one provision, section or part, shall not affect the validity of the remainder. Wherever the term "this Act" or "hereof" are used in Part Two, the same shall be construed as having no reference to Part One. (Act Apr. 18, 1933, c. 339, Pt. 2, §7.)

9633-20. Duration of act limited.—This Act shall remain in effect only during the continuance of the emergency and in no event beyond May 1, 1935. No extension of the period for redemption nor any postponement of sale shall be ordered or allowed under this Act which would have the effect of extending the period for redemption beyond May 1, 1935. (Act Apr. 18, 1933, c. 339, Pt. 2, §8.)

9633-21. Application of act.—Nothing in Part Two of this Act shall limit or restrict any provision of Part One. (Act Apr. 18, 1933, c. 339, Pt. 2, §9.)

BY ACTION

9634. By what rules governed.

12. Defenses.

In an action to have a deed declared a mortgage and have it foreclosed, it was immaterial that plaintiff had demanded more cash than was due, where defendant did not refuse to perform for that reason, but defended on other grounds. *Spielman v. A.*, 183M282, 236NW319. See Dun. Dig. 6435.

16. Notice of election—Treating whole amount due.

Acceleration clause, held operative after extension agreement with mortgagor's grantee. 181M249, 232NW33. See Dun. Dig. 6318.

9636. Judgment—Transcript to sheriff.

Personal judgment against grantee on mortgagor held properly denied. 172M366, 215NW516.

1. The judgment generally.

Judgment in foreclosure of mortgage is discharged as to any personal liability of mortgagor by his subsequent discharge in bankruptcy. *Fiman v. H.*, 185M582, 242NW292. See Dun. Dig. 749.

Our statutes provide for only one judgment in suit to foreclose real estate mortgage. It is final judgment determining all issues in case, and determining personal liability of mortgagor. *Fiman v. H.*, 185M582, 242NW292. See Dun. Dig. 6442.

Deficiency judgment entered by clerk without order of court and without notice to defendant, is but clerical computation of amount of deficiency for which execution may issue. *Fiman v. H.*, 185M582, 242NW292.

Judgment in action for the foreclosure of a mortgage held res judicata and not open to collateral attack in

action to enjoin trespass. *Brown v. G.*, 246NW473. See Dun. Dig. 5137, 5163.

On foreclosure of mortgage judgment is final judgment against mortgagor, but is not docketed as an unqualified personal judgment so that execution may issue thereon until after sale and determination of deficiency. *People's State Bank of Jordan v. R.*, 249NW326.

9641. Report—Confirmation—Resale.

2. Resale.
180M173, 230NW780.

9642. Satisfaction of judgment—Execution for deficiency.

People's State Bank of Jordan v. R., 249NW325; note under §9636.

Mortgagor conveying property to third person, who assumed the mortgage debt, held liable for deficiency after foreclosure where it requested and consented to extension of mortgage. 181M249, 232NW33. See Dun. Dig. 6294.

Deficiency judgment entered by clerk without order of court and without notice to defendant, is but clerical computation of amount of deficiency for which execution may issue. *Fiman v. H.*, 185M582, 242NW292. See Dun. Dig. 5036.

Bankrupt did not lose or waive his right to have deficiency judgment vacated, and foreclosure judgment set aside so far as it imposed personal liability upon him, by failing to apply to court to have foreclosure judgment reopened so as to set up his discharge as bar. *Fiman v. M.*, 185M582, 242NW292. See Dun. Dig. 5121.

Offer to waive right to judgment for deficiency could be withdrawn by mortgagee any time before acceptance. *New England Mut. Life Ins. Co. v. M.*, 247NW803. See Dun. Dig. 6484.

9643. Redemption by mortgagor, creditor, etc.

For rights of a creditor of a decedent debtor, see *Laws 1929, c. 195.*

Mortgagor is entitled to rents and profits during redemption period even though the foreclosure is of a second mortgage. 179M571, 229NW874.

Title to real estate acquired through a creditor's redemption from a foreclosure sale, held absolute. *Rochester Loan & Trust Co. v. F.*, 247NW241. See Dun. Dig. 6423.

GENERAL PROVISIONS

9646. Attorney's fees.

Attorney's fees cannot be charged as costs unless an attorney at law is employed. 181M254, 232NW318. See Dun. Dig. 6425.

9647. May be collected, when.

Attorney's fees cannot be charged as costs unless an attorney at law is employed. 181M254, 232NW318. See Dun. Dig. 6425.

9648. Purchaser at foreclosure, etc., may pay taxes, etc.

The purchaser at the sale, having failed to file an affidavit of taxes paid, they did not become a part of the sum to be paid in making redemption. 176M393, 223NW609.

Evidence supported finding that defendant requested plaintiff to withhold foreclosure of its first mortgage until defendant's second mortgage could be foreclosed so that defendant could pay interest due on first mortgage, and, by filing proper affidavit, tack it to amount bid at its foreclosure sale. *Bankers' Life Co. v. F.*, 247NW239. See Dun. Dig. 6260.

Provision requiring filing of affidavit as to insurance and taxes 10 days before expiration of period of redemption is mandatory. *Op. Atty. Gen.*, Sept. 21, 1929.

9649. Homestead included in mortgage—Separate sale.

Upon a mortgage foreclosure sale of the West Hotel in Minneapolis, the owner claimed a portion of the building as a homestead and demanded that the remainder of the mortgaged premises be first sold to satisfy the mortgage debt. Held, that the owner having the burden of proof failed to show that the property selected was compact in form and so chosen as not unreasonably to affect the value of the remaining part or that he was prejudiced. 181M392, 232NW740. See Dun. Dig. 4213.

Compliance by the mortgagor requires a separate sale of the homestead upon foreclosure, even though the non-exempt property included in the mortgage brings no bid when first separately offered. *Madson v. N.*, 182M450, 234NW636. See Dun. Dig. 6344a.

9650. Court to appoint receiver of rents.

Appointment of receiver and his powers respecting payment of taxes and interest on prior incumbrances before and after foreclosure sale. 172M193, 214NW886.

Mortgagee who purchased at foreclosure sale was not entitled to appointment of receiver to collect and apply rent on unpaid taxes which were taken into consideration in bidding in the property. 171M350, 214NW62.

A receiver should not be appointed to collect rents and profits and apply them on delinquent taxes or in-

terest, if the mortgagor is entitled to such rents, unless there is waste. 173M18, 216NW329.

Complaint against trustee foreclosing mortgage alleging that mortgage had been superseded by trust agreement and asking for receivership, held not to state cause of action. *Monnens v. H.*, 187M100, 244NW410. See Dun. Dig. 6459.

9651. Default to be shown.

Without proof of insolvency or inadequacy of security, nonpayment of taxes, not shown to jeopardize title or security during year of redemption, does not warrant appointment of receiver in action to foreclose mortgage. 176M71, 222NW516.

9655-1. Postponement of mortgage foreclosure sales.—Any sale upon the foreclosure of a mortgage upon real estate, either by action or by advertisement, which has heretofore been advertised or which may hereafter be advertised to be held at any date subsequent to the passage and approval of this act and prior to May 1, 1933, may be postponed for a period of not to exceed ninety days to a date subsequent to April 30, 1933, by the sheriff of the county in which such sale is advertised to be held, without the publication of a notice of such postponement in any newspaper; provided, however, such sheriff shall post a notice of such postponement at one of the entrance doors of the court house or county jail of the county where the sale was originally advertised to be held, at least three weeks prior to the date to which said sale shall be postponed. (Act Mar. 2, 1933, c. 44, §1; Mar. 16, 1933, c. 90, §1.)

Laws 1933, c. 44, is constitutional. *State v. Moeller*, 249NW330. See Dun. Dig. 207 to 209, 1628.

Duties of register of deeds as prescribed by Mason's Minn. St. sec 2217 are in no way affected by this law. Op. Atty. Gen., Apr. 3, 1933.

Governor's executive order to officers to desist from foreclosing mortgages expired by limitation on Apr. 30, 1933. Op. Atty. Gen., May 2, 1933.

9655-2. Posting of notices.—In all cases where any sheriff has heretofore and subsequent to February 23, 1923, postponed any such mortgage foreclosure sale, the said sheriff may again postpone the sale, provided, however, that the date to which said sale is finally postponed shall be subsequent to April 30, 1933, and shall not be more than ninety days from the date upon which said sale was originally advertised to be held, and provided further, that the said sheriff shall post a notice of such final postponement at one of the entrance doors of the court house or county jail of the county where the sale was originally advertised to be held, at least three weeks prior to the date to which the said sale shall be finally postponed. (Act Mar. 2, 1933, c. 44, §2; Mar. 16, 1933, c. 90, §2.)

9655-3. Acts legalized.—Any postponement heretofore made by any sheriff of any such mortgage foreclosure sale, without the publication of a notice of postponement in a newspaper, is hereby validated and is hereby declared to be legal and binding in all respects. (Act Mar. 2, 1933, c. 44, §3; Mar. 16, 1933, c. 90, §3.)

Adjournment of mortgage foreclosure sale by sheriff on Feb. 27, 1933, was validated by curative provision of act of Mar. 2, 1933, Laws 1933, c. 44. *State v. Moeller*, 249NW330.

9655-4. Provisions separable.—If any section or part of this act shall be declared unconstitutional or invalid for any reason, the remainder of this act shall not be affected thereby. (Act Mar. 2, 1933, c. 44, §4; Mar. 16, 1933, c. 90, §4.)

CHAPTER 84

Actions by or against Personal Representatives and Heirs

9656. What causes of action survive.

1. Held to survive.

Rights under Wisconsin Statutes 1927, §287.01 may be enforced in Minnesota. *Chubbuck v. H.*, 234NW314. See Dun. Dig. 14, 1530.

A right of action accruing to a party under a foreign statute will, as a matter of comity, be enforced in the courts of this state when jurisdiction can be had and justice done between the parties, if such statute be not contrary to the public policy of this state. *Chubbuck v. H.*, 182M225, 234NW314. See Dun. Dig. 14, 1530.

Action under Wisconsin Survival Statute, *Chubbuck v. M.*, 182M225, 234NW868.

A husband's cause of action for medical expenses and nursing incurred in attempting to cure his wife of the injuries negligently inflicted survives the death of the wife and the death of the wrongdoer. *Fowlie v. F.*, 184M82, 237NW846. See Dun. Dig. 14.

2. Held not to survive.

Under deed from parents to son conditioned upon payment of annuity to grantors or survivor and reserving lien on land, right to enforce lien was personal to grantors, and it could not be enforced by administrator. *Gamble v. M.*, 187M640, 246NW368. See Dun. Dig. 2678a, 3667.

3. Cause of action arising in another state.

Jurisdiction of estate of deceased tort-feasor may be acquired by service on personal representative as in case of surviving liability for torts committed here. *Kertson v. J.*, 185M591, 242NW329. See Dun. Dig. 3669.

9657. Action for death by wrongful act.

2. Construction and application of statute.

The next of kin of a deceased person are persons interested in the outcome of an action to recover damages for causing the death of such deceased person. *Dougherty v. G.*, 184M436, 239NW153. See Dun. Dig. 10316.

9. Defences.

That one defendant in action for death of guest in automobile was son of decedent and would benefit by recovery did not prevent recovery by personal representative for benefit of other beneficiaries, though reduction or apportionment because of negligence might be made. *Anderson v. A.*, 248NW35. See Dun. Dig. 2616.

11. Limitation of actions.

Action for death against city must be commenced within one year from the occurrence of the loss or injury. 178M489, 227NW653.

16. Damages.

Where the action is brought to recover for death by wrongful act, and the defense is contributory negligence by one or more of the next of kin or beneficiaries, the proper practice is to require the jury to assess the value of the loss of the life to all the next of kin and by special verdict determine who, if any, of the next of kin was guilty of contributory negligence. *Harrington v. A.*, 183M74, 235NW534. See Dun. Dig. 2616(7).

\$2,564, held not excessive for death of child. 179M528, 229NW784.

Measure of damages for wrongful death is money value to surviving spouse, if any, and next of kin, of continuance of decedent's life, measured by money value of what evidence shows decedent probably, or with reasonable certainty, would have contributed to them in money, property, or services, during remainder of his life. *Wiester v. K.*, 247NW237. See Dun. Dig. 2617.

Verdict for \$7,500 was not excessive for death of woman 52 years of age leaving 10 children. *Anderson v. A.*, 248NW35. See Dun. Dig. 7157.

16a. Disposition of proceeds.

It cannot be said that children of parent not engaged in any gainful occupation, but who has means or income by which he contributes to them, will suffer no pecuniary loss by his death, though they will inherit his property. *Wiester v. K.*, 247NW237. See Dun. Dig. 2617.

16b. Negligence.

Negligence of defendant held not the proximate cause of death. 171M486, 214NW763.

A husband's cause of action for medical expenses and nursing incurred in attempting to cure his wife of the injuries negligently inflicted survives the death of the wife and the death of the wrongdoer. *Fowlie v. F.*, 184M82, 237NW846. See Dun. Dig. 14.

17. Evidence.

Evidence of financial condition of next of kin, held admissible. 179M528, 229NW784.

Person killed in an accident in the absence of eyewitnesses is presumed to have exercised due care. *Dougherty v. G.*, 184M436, 239NW153. See Dun. Dig. 2616(12).

It was not error to refuse to receive in evidence the general inventory filed in probate court in decedent's estate, as bearing upon the amount of damages resulting from his death. *Quinn v. Z.*, 184M589, 239NW902. See Dun. Dig. 2619.

In action to recover for death by wrongful act, directed verdict for defendant is proper, where evidence of causal connection between defendant's wrongful act