

1940 Supplement
To
Mason's Minnesota Statutes
1927

(1927 to 1940)
(Superseding Mason's 1931, 1934, 1936 and 1938
Supplements)

Containing the text of the acts of the 1929, 1931, 1933, 1935, 1937 and 1939 General Sessions,
and the 1933-34, 1935-36, 1936 and 1937 Special Sessions of the Legislature, both new and
amendatory, and notes showing repeals, together with annotations from the
various courts, state and federal, and the opinions of the Attorney
General, construing the constitution, statutes, charters
and court rules of Minnesota together with digest
of all common law decisions.



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vate said land during said year upon such terms as the Court shall find to be just and equitable. (Apr. 24, 1937, c. 408, §1.)

9584-2. Service of notice of petition—hearing.—Such petition and notice of motion for hearing thereon shall be served as now provided for the service of a summons in a civil action upon the mortgagee or execution creditor if he is the owner of the Sheriff Certificate of Sale of record and upon each creditor of the mortgagor holding a lien of record upon the mortgaged premises; if said Certificate has been transferred of record, then upon the owner of the Sheriff Certificate of Redemption or execution sale appearing of record. If the owner of record is the original mortgagee or the execution creditor, then service may be made by registered mail upon such mortgagee or execution creditor or upon his attorney foreclosing said mortgage or the attorney whose name appears on the execution as attorney for the execution creditor in the case of an execution sale.

The hearing upon said motion shall be not less than 10 days nor more than 20 days after the service of such notice of motion. (Apr. 24, 1937, c. 408, §2.)

9584-3. District Court to have jurisdiction.—When service has been made as provided in the previous section of such notice and petition before the time for redemption has expired, the District Court of the County in which said lands are situated shall have jurisdiction and equitable power to provide for the cultivation of said lands during said year as herein provided upon such terms as the Court shall find to be just and equitable, and prevent irreparable loss to the parties interested. (Apr. 24, 1937, c. 408, §3.)

9584-4. Court to determine fair rental value.—Upon such hearing, if the Court shall find that the allegations of the petition are true and that said lands may not be farmed or cultivated during the year in which the period of redemption expires, the Court shall determine the fair rental value of said premises from the time the period of redemption expires until the 1st day of October in said year assuming that said land is farmed in a good and husbandlike manner and shall determine what rent or share shall be paid to the holder of the Sheriff Certificate of foreclosure sale or execution sale during said extended period and shall provide for the giving of security by the applicant or tenant for the payment of such rents or share of the crops or income from said lands, and the Court may require the parties to execute a lease or leases to carry out the order of the court, the lease by its terms to expire on October 1, of the year in which made; but the tenant shall have a reasonable time thereafter to remove from the land his crops grown thereon and other articles of personal property owned by him. (Apr. 24, 1937, c. 408, §4.)

9584-5. Court may grant certain rights—Plowing.—The Court may further grant to the owner of the Sheriff Certificate of Redemption or Certificate of Execution Sale, the right to plow upon said premises after the crops have been removed or should have been removed from said premises. (Apr. 24, 1937, c. 408, §5.)

9584-6. Application of act.—This act shall not be construed as extending the period of redemption but as granting relief in equity to the interested parties and to prevent irreparable loss and to fully compensate the owner of the Sheriff Certificate for the use and occupation of the lands granted pursuant to this act. (Apr. 24, 1937, c. 408, §6.)

9585. Trespass—Treble damages.

Verdict for \$350 held not excessive for cutting of trees. *Hansen v. M.*, 182M321, 234NW462. See Dun. Dig. 2597, 9696(33).

9590. Action to determine boundary lines.

Establishment of center of section of land. 172M338, 215NW426.

In action to determine boundary line between city lots, evidence held to show that plaintiffs were estopped to deny ownership of land upon which building existed. *Lobnitz v. F.*, 186M292, 243NW62. See Dun. Dig. 1083.

Testimony of county highway engineer and surveyor acquainted with locality and reputed corners and quarter corners of section involved, held sufficient to admit his survey in evidence, and upon which court could find true boundary line between farms of plaintiff and defendants. *Lenzmeier v. E.*, 199M10, 270NW677. See Dun. Dig. 1081.

Evidence held not such as to warrant a finding that owners of two farms had ever established a boundary line by practical location, nor that defendants by adverse occupation had acquired title to any of plaintiff's land. *Id.* See Dun. Dig. 1083.

Words "about," "approximately," and "more or less," in connection with courses and distances, may be disregarded if not controlled or explained by monuments, boundaries, and other expressions of intention, and may be given meaning and effect when so controlled and explained. *Ingelson v. O.*, 199M422, 272NW270. See Dun. Dig. 1060.

Action to determine boundaries, is not merely to establish boundary lines according to government survey, but also to determine boundary line according to respective existing rights of property of parties. *Hacklander v. P.*, 204M260, 283NW406. See Dun. Dig. 1084.

In division of dried-up bed of meandered lake, if parties cannot agree, action in district court to determine boundary lines is only remedy. *Op. Atty. Gen.*, May 16, 1932.

9591. Pleadings—Additional parties.

Title by adverse possession may be proved under a general allegation of ownership. 171M488, 214NW283.

9592. Judgment—Landmarks.

Action contemplates the settlement of title and a judgment is res adjudicata in a subsequent action in ejectment. 171M488, 214NW283.

In a suit to establish a boundary line, evidence conclusively shows an estoppel in pais in favor of defendants. *Liedberach v. P.*, 199M554, 273NW77. See Dun. Dig. 1083.

CHAPTER 83

Foreclosure of Mortgages

BY ADVERTISEMENT

9602. Limitation.

½. In general.

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.

Mortgagor of real estate has an equity of redemption which may not be terminated except by foreclosure or by lawful surrender of equity of redemption. *Stipe v. J.*, 192M504, 257NW99. See Dun. Dig. 6215.

Court of equity could order mortgage foreclosure set aside, provided mortgagor executed renewal notes and renewal mortgage in accordance with previous agreement entered into with mortgagee but unperformed by mortgagee. *Young v. P.*, 193M578, 259NW405. See Dun. Dig. 6487.

Certified copies of record of mortgage foreclosure by advertisement in office of register of deeds are admissible in Iowa without complying with Mason's U. S. C. A., Title 28, §388. *Bristow v. L.*, 221 Iowa 304, 266NW808.

A mortgage of land is no longer a conveyance, but creates only a mere lien or security. *Hatlestad v. M.*, 197 M640, 268NW665. See Dun. Dig. 6145.

Whether proceedings to foreclose mortgage be had by action or by advertisement, objects and ends sought are to enforce security, to have property applied to satisfaction of debt or other obligation secured thereby. *Fredin v. C.*, 285NW615. See Dun. Dig. 6303(60).

4. The power.

While attorney was acting as a collector for mortgagor, his failure to collect and pay mortgagee was not chargeable to mortgagee, though such attorney subsequently represented mortgagee in foreclosure of mortgage, as affecting wrongfulness of foreclosure. *Hayward Farms Co. v. U.*, 194M473, 260NW868. See Dun. Dig. 6318.

11. Effect of foreclosure on lien.

Where plaintiff held a mortgage, and an assignment of rents given it in consideration of an extension of time on past-due interest and that to become due during extension, price bid upon foreclosure sale is to be applied by equity, first upon indebtedness for which creditor held but a single security, leaving interest secured by assignment as a still existing debt protected by such assignment. *Prudential Ins. Co. v. A.*, 196M154, 264NW576. See Dun. Dig. 6314.

Mortgagee with deficiency judgment was entitled to bring an action at law upon assignment of lease and rents subject only to right of mortgagor, in an appropriate proceeding, to collect any surplus over and above debt owed by defendant to plaintiff. *Id.* See Dun. Dig. 6484.

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.

1/2. In general.

Finding that interest had been paid and that no default had occurred held sustained by the evidence. 171 M469, 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, 244NW665. See Dun. Dig. 6150 to 6156.

In action to enjoin foreclosure of \$2,300 mortgage on ground that \$1,500 thereof has been paid, it is held that mortgagor is entitled to relief asked. *Granberg v. P.*, 195M137, 262NW166. See Dun. Dig. 6437.

Where a foreign corporation took a real estate mortgage while duly licensed to do business in this state, it could foreclose mortgage by advertisement after license expired. *Young v. P.*, 196M403, 265NW278. See Dun. Dig. 6320.

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.

Suit for accounting against mortgagee and third party was not an action pending which precluded foreclosing mortgage by advertisement. *Young v. P.*, 196M403, 265 NW278. See Dun. Dig. 6319.

7. Assignee of mortgage.

Where a mortgagee and a trustee under a \$75,000 mortgage is owner of \$42,000 worth of bonds and pledges them as collateral security to a loan with reconstruction finance corporation and executes an assignment of his interest in the mortgage, as security only, and such assignment is not recorded, mortgagee and trustee may foreclose by advertisement without making assignee a party. *Feldman v. E.*, 278Mich619, 270NW809.

9604. Notice of sale—Service on occupant.

1. Publication.

The statement of the holding in 6 Minn. 192 (123) to the effect that a sale may be held on the last day of publication may be somewhat misleading. It should be qualified by the further statement that the full period of notice must have run at the date of the last publication. Thus the requirement in this section is six weeks' notice or 42 days, and if the first publication occurs August 3 and the last on September 14, seven publications have occurred involving 42 days' notice after excluding the first day and including the last.—Editor.

Where mortgage sale by advertisements has been had on insufficient publication of notice, mortgagor may remain in possession and proceed with an action to set

aside the sale, or remain in possession and assert right against any one claiming under foreclosure. *White v. M.*, 192M522, 257NW281. See Dun. Dig. 6356.

First publication on August 6th and last publication on September 10th did not constitute six weeks' published notice necessary for foreclosure of mortgage on September 16. *Id.* See Dun. Dig. 6337.

Where action was started under moratorium statute to permanently postpone mortgage foreclosure by advertisement, and, on order being granted ex parte, mortgagee made publication of no more notices of sale, and mortgagors did not appear at hearing and court dismissed their complaint and ordered the property to be sold on the date originally noticed, and no appeal was taken and property was sold, order dismissing complaint and authorizing sale was a barrier to a subsequent action by mortgagors to set aside the sale because notice of sale had been published only four times. *Tankel v. U.*, 196M 165, 264NW693. See Dun. Dig. 6337.

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.

That a return of service described a lessee in possession of a garage as "H. A. Salisbury" when in fact his name was Hector A. Salvall does not invalidate service. *Rhode Island Hospital Trust Co. v. C.*, 191M354, 254NW 466. See Dun. Dig. 6326, 6921, 7318.

Service of notice upon company which admittedly had possession of grounds, hallways, stairways, and untenanted apartments of an apartment building was service upon the "person in possession" of premises upon which houses were located. *Id.*

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

9605. Requisites of notice.

Curative act: Act Apr. 5, 1939, c. 147, §6. See Appendix 5, ¶21, post.

4. The amount claimed to be due.

That notice of foreclosure stated amount due to be more than actually due did not vitiate foreclosure, nor did fact that mortgagee bid more than was due on debt and expenses of foreclosure, excess being applied on counterclaim. *Young v. P.*, 196M403, 265NW278. See Dun. Dig. 6329.

9606. Attorney to foreclose—Record of power.

See Act Jan. 24, 1936, Sp. Sess. 1935-36, c. 92, set forth in Appendix 5, ¶21 herein, post.

Curative act: Act Apr. 5, 1939, c. 147, §8. See Appendix 5, ¶21, post.

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.

Signing power of attorney to foreclose mortgage in individual name, without adding "as administratrix of estate" was cured by Laws 1931, c. 237, §1, and Laws 1933, c. 437, §1. *Baker v. R.*, 199M148, 271NW241. See Dun. Dig. 6307.

Section 9283 authorizes district court to set aside order extending time to redeem under §9633-5 and a subsequent order declaring a default by mortgagor of terms of extension order, where proceedings are had under a mistake of fact that mortgage foreclosure was valid, when foreclosure was void because of failure to file power of attorney to foreclose prior to mortgage foreclosure sale. *Orfield v. M.*, 199M466, 272NW260. See Dun. Dig. 6392.

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. 175 M541, 222NW71.

10. In general.

Foreclosure by advertisement of a real estate mortgage is not void because neither mortgagee nor his attorney, with power to conduct foreclosure, is personally present at sale, nor because attorney delegated to another ministerial function of submitting to sheriff a bid on behalf of mortgagee who purchased at sale. *Klotz v. J.*, 201M355, 276NW244. See Dun. Dig. 6339.

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

Sheriff is not authorized to hold mortgage foreclosure sale after filing of petition under Mason's U. S. Code, Tit. 11, §203, prior to disposition of petition by court without specific authority from court of bankruptcy. *Op. Atty. Gen.* (544k), Oct. 12, 1934.

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*, 189M412, 249NW330. Adjudgment 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.

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. *Prideaux v. D.*, (US DC-Minn), 34P(2d)308. Appeal dismissed, 51SCR40.

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.*, 189M98, 248NW667. See Dun. Dig. 9610.

Last paragraph applies only to mortgage foreclosures on installments and not where there is a foreclosure for entire debt. *Young v. P.*, 196M403, 265NW278. See Dun. Dig. 6315.

9611. Surplus.

That notice of foreclosure stated amount due to be more than actually due did not vitiate foreclosure, nor did fact that mortgagee bid more than was due on debt and expenses of foreclosure, excess being applied on counterclaim. *Young v. P.*, 196M403, 265NW278. See Dun. Dig. 6329.

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, 227NW 182.

9613. Certificate of sale—Record—Effect.**THE CERTIFICATE****4 $\frac{1}{2}$. 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.

RIGHTS AND LIABILITIES OF PURCHASER**5. Nature of interest during redemption period.**

Where the mortgagee purchases for amount of mortgage at foreclosure sale he becomes a purchaser of premises with vested right to become absolute owner in absence of redemption. *Klein (USDC-Minn)*, 9FSupp 67, 61. See Dun. Dig. 6369.

Bankruptcy Act prohibition against foreclosure proceedings subsequent to a farmer's petition for an extension, held not to extend period of redemption where a mortgagor did not file his petition until four months after foreclosure sale and purchase by mortgagee. *Id.* See Dun. Dig. 6400.

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

9. Succeeds to rights of mortgagee.

Rights acquired by purchaser at a foreclosure sale are those possessed and owned by mortgagor at time of making of mortgage, together with all subsequently acquired rights, easements, and privileges which are essential to full enjoyment of property. *Tomasko v. C.*, 200M69, 273NW628. See Dun. Dig. 6381.

10. Effect of mortgagee bidding in.

Where holder of first and second mortgages, executed by same mortgagor and covering same real estate, forecloses his second mortgage, and thereby, in default of redemption, gets title in fee, lien of first mortgage is merged in fee; and debt thereby secured is discharged where it does not appear that there was intention to prevent such merger. *Mulligan v. F.*, 194M451, 260NW 630. See Dun. Dig. 6117, 6272.

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 re-

ceiver to apply rents to repairs during year of redemption. *Greene v. T.*, 188M381, 246NW921. See Dun. Dig. 6457(40).

Where plaintiff foreclosed a mortgage upon premises leased to defendants after mortgage was given, and there was no redemption and title went to plaintiff February 24, 1931, and defendants notified plaintiff that premises would be vacated on March 31, 1931, and that they would remain no longer, plaintiff could not, without defendants' consent, convert tenancy at will or at sufferance to a tenancy under lease, and no rent could be recovered for April, May, and June, 1931. *Geo. Benz & Sons v. W.*, 198M311, 269NW840. See Dun. Dig. 6219.

12 $\frac{1}{2}$. 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. *Id.*

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

Section is unconstitutional insofar as it attempts to limit time within which person rightfully and continuously in possession of the mortgaged land can question foreclosure proceedings ineffective because proper statutory notice of foreclosure was not served upon the occupant. *Hammon v. H.*, 192M259, 256NW94. See Dun. Dig. 1620.

In action by mortgagor to set aside foreclosure, where-in defendant counterclaimed for damages for wrongful detention of possession by mortgagor after expiration of period of redemption, and asked for recovery of possession, objection at trial to litigation of counterclaim was without merit, where there was no demurrer nor reply challenging legal standing of counterclaim. *Young v. P.*, 196M403, 265NW278. See Dun. Dig. 6487.

Knowledge that mortgage was being foreclosed was sufficient to put mortgagor on prompt inquiry as to regularity of foreclosure proceedings, and he is chargeable with knowledge he would have acquired had he made that inquiry. *Bjornstad v. P.*, 202M145, 277NW521. See Dun. Dig. 6487(68).

When an action to set aside a foreclosure sale is not commenced within time required, statute operates to cure defect and validate defective sale. *Id.*

It is not enough that mortgagor commences action within five-year limitation period unless requirement of reasonable diligence has also been complied with. *Id.*

9626. Redemption by mortgagor.**2. Right favored.**

Right of redemption, whether by owner or by subsequent lien creditor, is a right favored by law, and statutes are to be construed liberally in favor of redemptioner. *Tomasko v. C.*, 200M69, 273NW628. See Dun. Dig. 6384, 6386, 6387.

Transactions involving bargaining away equity of redemption are carefully scrutinized by court to end that mortgagee may not take any undue advantage of mortgagor's necessities. *Twenty Associates v. F.*, 200M211, 273NW696. See Dun. Dig. 6384.

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.

Strict foreclosure. 23MinnLawRev388.

6. Release.

Though a mortgagor may not, at time of making a mortgage, bargain away or sell to mortgagee his equity of redemption, he may do so subsequently under certain circumstances. *O'Connor v. S.*, 190M177, 251NW180. See Dun. Dig. 6146, 6385, n. 74.

A mortgagor may not, at time of, nor as a part of mortgage transaction, bargain away his equity of redemption; and any attempt so to do will not be enforced by a court of equity, but may do so subsequent to execution of mort-

gage, provided conveyance is not made pursuant to a collateral agreement contemporaneous with execution of mortgage. *Twenty Associates v. F.*, 200M211, 273NW 696. See Dun. Dig. 6228.

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.

13. 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.

14. 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.

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

There was no implied contract to further extend period of redemption from a mortgage foreclosure sale from acceptance of payment after expiration of redemption period. *Van Dyke v. K.*, 198M578, 270NW608. See Dun. Dig. 6392.

Within a year after a sale upon foreclosure, mortgagor or his successor in title may redeem from foreclosure by proceeding as outlined in §9626. If owner fails to redeem within that period then a creditor having a lien upon premises, provided he has filed statutory notice of intention, may redeem by complying with §9627. *Tomasko v. C.*, 200M69, 273NW628. See Dun. Dig. 6381.

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, 222NW512.

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.

Where second mortgagee redeems from sale under first mortgage, third mortgagee cannot make redemption without making tender of amount sufficient to cover lien of second mortgagee. *Op. Atty. Gen.* (390c-14), June 20, 1935.

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).

As to a subsequent lien claimant who has duly placed himself in line of redemption, failure on part of mortgage debtor, in a moratorium proceeding instituted by him against certificate holder alone, to notify holder of such claim leaves such claimant free to act pursuant to statute which gives him right of redemption. *Tomasko v. C.*, 200M69, 273NW628. See Dun. Dig. 6410, 6411.

4. Tacking subsequent liens.

Purchaser at a foreclosure sale may pay taxes against foreclosed premises and have an additional lien thereon to be tacked to amount of his sheriff's certificate and included in amount required to make a redemption on part of a subsequent lienholder, but it is mandatory that he file statutory affidavit required by §9648, and failure so to do precludes certificate holder from claiming payment of such additional amount as against a subsequent lien claimant redeemer. *Tomasko v. C.*, 200M69, 273NW 628. See Dun. Dig. 6416, 9255, 9257.

10. Order among successive creditors.

Rule that priority of lien for purposes of redemption is determined by time of record, without reference to nature of estates in land owned by mortgagor or judgment debtor, was applied in determining priority of lien as between docketing of successive judgment. *Lowe v. R.*, 201M280, 276NW224. See Dun. Dig. 3540, 3541c, 6415, 6416.

12. Nature of right.

Right of redemption, whether by owner or by subsequent lien creditor, is a right favored by law, and statutes are to be construed liberally in favor of redemptioner. *Tomasko v. C.*, 200M69, 273NW628. See Dun. Dig. 6384, 6386, 6387.

14. When right accrues.

Within a year after a sale upon foreclosure, mortgagor or his successor in title may redeem from foreclosure by proceeding as outlined in §9626. If owner fails to redeem within that period then a creditor having a lien upon premises, provided he has filed statutory notice of intention, may redeem by complying with §9627. *Tomasko v. C.*, 200M69, 273NW628. See Dun. Dig. 6381.

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).

Where defendant was owner of a mortgage covering three tracts of land, one constituting mortgagor's homestead, and plaintiff was owner of one of tracts and had an interest in another as a purchaser upon execution sale, and had no interest in tract constituting homestead, upon request by plaintiff for a statement of amount due and tender of full amount, plaintiff became subrogated to all of rights of defendant in prior encumbrance and trial court was justified in ordering an assignment of mortgage to plaintiff upon payment of amount so tendered. *First Nat. Bank v. S.*, 201M359, 276NW290. See Dun. Dig. 9048.

2. Amount necessary to redeem.

Where second mortgagee redeems from sale under first mortgage, third mortgagee cannot make redemption without making tender of amount sufficient to cover lien of second mortgagee. *Op. Atty. Gen.* (390c-14), June 20, 1935.

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.
A life tenant who redeems an outstanding mortgage lien is entitled to contribution from remaindermen in an amount equal to mortgage lien less present worth of life tenant's liability to pay interest during his expectancy. *Engel v. S.*, 191M324, 254NW2. See Dun. Dig. 1922a.

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. 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.

Where defendant was owner of a mortgage covering three tracts of land, one constituting mortgagor's homestead, and plaintiff was owner of one of tracts and had an interest in another as a purchaser upon execution sale, and had no interest in tract constituting homestead, upon request by plaintiff for a statement of amount due and tender of full amount, plaintiff became subrogated to all of rights of defendant in prior encumbrance and trial court was justified in ordering an assignment of mortgage to plaintiff upon payment of amount so tendered. *First Nat. Bank v. S.*, 201M359, 276NW290. See Dun. Dig. 9048.

Upon a showing that a subsequent encumbrancer has tendered to a prior encumbrancer entire amount due on a mortgage, together with costs, disbursements, and attorney's fees required by statute, court may enjoin foreclosure of mortgage until disputed issues in case are determined. *Id.*

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.
Laws 1937, Sp. Ses., c. 35.
Laws 1937, c. 432. 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.
Laws 1933, c. 26, §1. Amended Apr. 17, 1937, c. 248.
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.
Laws 1935, c. 287. Certain defective foreclosures legalized.
Laws 1935-36, Sp. Ses., cc. 33, 51, 92. See Appendix 5, 121, post.
Laws 1939, c. 147. See Appendix 5, par. 21, post.

EMERGENCY RELIEF ACT

Preamble 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, a condition of subnormal rainfall has existed in the State of Minnesota for several years, and this condition has greatly reduced the total products of the farms in Minnesota during the past two years; 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 have 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 possesses 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: NOW THEREFORE, Be it enacted, etc.:

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 pledge 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; Mar. 15, 1935, c. 47; Feb. 13, 1937, c. 21; Feb. 4, 1939, c. 7.)

Laws 1939, c. 7, extends relief to March 1, 1941.

This act is constitutional. *Blaisdell v. H.*, 189M422, 249 NW334. Aff'd 290US398, 54SCR231.

While statute is in derogation of common law, it is remedial in nature and to be fairly construed to accomplish its purpose. *Anderson v. H.*, 191M414, 254NW585. See Dun. Dig. 6400.

There can be no declaratory judgment as to constitutionality of bonds where both parties seek the same decree. *County Board v. B.*, 192M512, 257NW92.

Motion of appellants as defendants in mortgage foreclosure to remand cause to district court was denied for reason that mortgage foreclosure sale made after entry of judgment appealed from could not affect validity of judgment, and because appellants have a remedy under the moratorium act when any attempt is made to enforce the judgment against real estate. *First Nat. Bank v. C.*, 195M144, 262NW222. See Dun. Dig. 6392.

Mortgages held by a federal joint stock land bank are excepted from operation of mortgage moratorium act. *Leuthold v. D.*, 197M132, 266NW450. See Dun. Dig. 6392.

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.

Provision accepting mortgages held by government or agency thereof does not apply to a mortgage assigned by a private party or bank to a federal agency as collateral security for loan to mortgagee. *Op. Atty. Gen.* (415c), June 19, 1935.

Laws 1939, c. 7, is applicable to rural credit mortgages. *Op. Atty. Gen.* (415M), Feb. 9, 1939.

Constitutionality of this act depends upon whether an emergency exists. *Op. Atty. Gen.* (415f), April 4, 1939.

Effect of termination of emergency upon validity of moratorium legislation. 22MinnLawRev1047.

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. 339, Pt. 1, §1; Mar. 15, 1935, c. 47, Pt. 1, §1; Feb. 13, 1937, c. 21, Pt. 1, §1; Feb. 4, 1939, c. 7, Pt. 1, §1.)

Laws 1935, c. 47, cannot be so construed as to toll the running of the prior mortgage moratorium statute where title has vested in purchaser at foreclosure sale. *Hjeltness v. J.*, 195M175, 262NW153. See Dun. Dig. 6392.

Act is constitutional. *National Bank of Aitkin v. S.*, 195M273, 262NW689. See Dun. Dig. 6392.

Laws 1935, c. 47, §1, which continues in effect the provisions of this act is constitutional. *Op. Atty. Gen.* (415f), Mar. 5, 1935.

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 said 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. 1, §2; Mar. 15, 1935, c. 47, Pt. 1, §2; Feb. 13, 1937, c. 21, Pt. 1, §2; Feb. 4, 1939, c. 7, Pt. 1, §2.)

Statute held valid as extending period of redemption from foreclosure of mortgages on land not homestead. *Grace v. L.*, 189M450, 249NW672.

Where action was started under moratorium statute to permanently postpone mortgage foreclosure by advertisement, and on order being granted *ex parte*, mortgagee made publication of no more notices of sale, and mortgagors did not appear at hearing and court dismissed their complaint and ordered property to be sold on date originally noticed, and no appeal was taken and property was sold, order dismissing complaint and authorizing sale was a barrier to a subsequent action by mortgagors to set aside sale because notice of sale had been published only four times. *Tankel v. U.*, 196M165, 264NW693. See Dun. Dig. 6337, 6392.

Where suit is brought against a foreign corporation, whether licensed to do business or not, it has right to defend and interpose a counterclaim, or to meet and defend by cross-complaint and facts shown thereunder. *Flakne v. M.*, 193M465, 270NW566. See Dun. Dig. 6392.

There was no implied contract to further extend period of redemption from a mortgage foreclosure sale from acceptance of payment after expiration of redemption period. *Van Dyke v. K.*, 193M578, 270NW608. See Dun. Dig. 6392.

Court had no further jurisdiction of case after expiration of period of redemption. *Id.*

In a proceeding to obtain a second extension of time within which to redeem from a real estate mortgage foreclosure sale, finding of lower court that relators had no remaining equity in property and that amount deposited with escrowee was inadequate to reimburse mortgagee in full for relators' indebtedness to him after payment of all liens and obligations necessary to be discharged by means of such proceeds held supported by record. *Sjodin v. O.*, 199M37, 271NW591. See Dun. Dig. 6392.

A petitioner must come into court with clean hands and be willing to do equity so far as reasonably within his power. *Santee v. T.*, 201M66, 275NW366. See Dun. Dig. 6392.

It is not determinative against owner that instead of being himself a "dirt farmer" he seems to be a speculator in real estate, particularly farm lands, but it is conclusive against him where after buying mortgagor's equity he neither paid nor offered to pay anything on account of current taxes and is a man of means. *Id.*

This act is constitutional. *Op. Atty. Gen.* (4151), Mar. 5, 1935.

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 appears 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 twenty 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. 339, Pt. 1, §§3, 3.1, 3.2; Mar. 15, 1935, c. 47, Pt. 1, §§3, 3.1, 3.2; Feb. 13, 1937, c. 21, Pt. 1, §§3, 3.1, 3.2; Feb. 4, 1939, c. 7, Pt. 1, §3.)

Where parties concerned with application for an order extending period for redemption from mortgage foreclosure made a settlement in regard to extension by agreeing that period of redemption should be extended to a certain date and that petitioner should have right to receive and retain rents from that date and receive a certain sum for a mechanical stoker, the agreement was a binding settlement of the litigation, notwithstanding terms had not been incorporated in a written stipulation or memorial of the completed settlement, and the agreement was not vitiated under the statute of frauds or otherwise by reason of inclusion of transfer of personal property or fixtures. *State v. District Court*, 194 M32, 259NW542. See Dun. Dig. 6392.

(1). Compromises and compositions between mortgagor and mortgagee are specifically authorized, and court has jurisdiction thereof and may by its order confirm and approve settlement or composition, or both, and legislature cannot subsequently change rights. *Twenty Associates v. F.*, 200M211, 273NW696. See Dun. Dig. 6392.

(2). Action to recover on note, secured by mortgage, held not premature because brought before foreclosure of the mortgage. Such an action may be within this provision, but the effect of this provision is not to postpone the bringing of an action or securing judgment, but to suspend realization upon the judgment. *Phillips v. U.* (USCCA8), 83F(2d)188.

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 March 1, 1941; 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, further, 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 default 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 sale shall terminate 30 days after there shall have been filed in the office of the clerk of court an order by the court finding such default or waste to exist, and thereupon 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. Such order may be made by the court after hearing held upon not less than five days' notice in writing to the defaulting party or his attorney. Provided, further, that holders of subsequent liens may redeem in the order and manner now provided by law beginning 30 days after the service upon such mortgagor, or judgment debtor, or their personal representatives or assigns and holders of subsequent liens, of notice of default and the filing of such notice of default with proof of service thereof 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. Such 30 day period shall not begin to run until the filing of an order by the court finding such default or waste to exist. 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 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 March 1, 1941, 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. (Apr. 18, 1933, c. 339, Pt. 1, §4; Mar. 15, 1935, c. 47, Pt. 1, §4; Feb. 13, 1937, c. 21, Pt. 1, §4; Feb. 4, 1939, c. 7, Pt. 1, §4.)

Action to recover on note, secured by mortgage, held not an action for a "deficiency judgment" within this provision, and not premature because brought before foreclosure of the mortgage. *Phillips v. U.* (USCCA8), 88 F(2d)188.

This provision is confined solely to deficiency judgments as understood in legal parlance, that is a balance of personal indebtedness above the amount realized on sale of mortgaged property securing such indebtedness. *Id.*

Petition and not notice, was application required by statute to be made before expiration of period of redemption, and it is sufficient that it was served and filed within that time. *Anderson v. H.*, 191M414, 254NW 535. See Dun. Dig. 6400.

Service of motion for extension of time for redemption from mortgage foreclosure sale upon attorneys who made such foreclosure by advertisement is good and effective service upon mortgagee who bid in premises at sale. Service on mortgagee by mail is not authorized. *Swanson v. C.*, 192M81, 255NW812. See Dun. Dig. 6392, 6400.

Record of affidavits filed pursuant to §9648 was competent proof of taxes and insurance paid subsequent to foreclosure sale by holder of sheriff's certificate. *Young v. P.*, 192M446, 256NW906. See Dun. Dig. 3355.

Granting of extension to redeem is not mandatory, but it is for trial court to determine according to equities of parties concerned. *Id.* See Dun. Dig. 6392.

Where court extended time within which redemption from a foreclosure sale might be made to Feb. 1, 1935, with a provision in order that a payment should be made

by mortgagor to mortgagee on Oct. 1, 1934, court had no power to revise and alter terms of extension order after default had existed for more than 30 days in payment due on Oct. 1, 1934. *Mosse v. M.*, 193M496, 259NW 19. See Dun. Dig. 6392.

Act does not forbid a suit in this state to recover balance due on a promissory note executed and delivered in Iowa and secured by real estate mortgage upon land situate in that state, which mortgage has been foreclosed and proceeds applied on note, leaving due and unpaid balance sued for. *Connecticut Mut. Life Ins. Co. v. H.*, 194M41, 259NW390. See Dun. Dig. 6392.

Notice on mortgagee that mortgagor will apply for an extension of time to redeem is not application for extension of time to redeem. *Rebold v. C.*, 194M73, 259NW 684. See Dun. Dig. 6392.

Where property under foreclosure produces no income from which holder of sheriff's certificate could receive any benefit, and there is no showing of any reasonable probability that property will produce income which could be allocated to holder of such certificate, and rental value of property is less than sufficient to pay taxes thereon and interest on incumbrances prior to foreclosed mortgage, court was fully justified in denying petition for extension of time for redemption. *Rodine v. D.*, 194M121, 259NW699. See Dun. Dig. 6392.

Where mortgagor failed to make payments to mortgagee over a period of more than 30 days beyond time fixed by court in order extending time for redemption from mortgage foreclosure sale, court cannot thereafter revise or alter terms of extension under moratorium act, title having passed to mortgagee, who was purchaser at foreclosure sale. *Butts v. T.*, 194M243, 260NW308. See Dun. Dig. 6392.

Mortgagor's bankruptcy did not suspend court's order extending time for redemption from mortgage sale, order having fixed terms and conditions, compliance with which was wholly lacking. *Id.* See Dun. Dig. 6392.

Granting of an extension of time for redemption from a mortgage foreclosure sale is not mandatory, and time of extension is for court to decide. *Nordmarken v. E.*, 194M389, 260NW628. See Dun. Dig. 6392.

Service of notice upon attorney for mortgages (purchaser at the sale) was insufficient where no petition, notice or other papers relative to matter were filed with court prior to expiration of period of redemption already extended. *Koerber v. T.*, 194M654, 260NW353. See Dun. Dig. 6392.

Laws 1935, c. 47, cannot be so construed as to toll running of prior mortgage moratorium statute where title has vested in purchaser at foreclosure sale. *Hjeltness v. J.*, 195M175, 262NW158. See Dun. Dig. 6392.

Granting of extension to redeem real property from an execution sale is not mandatory, but it is for trial court to determine according to equities of parties. *First Nat. Bank v. H.*, 195M185, 262NW160. See Dun. Dig. 6392.

Thirty-day period under 1935 act applies to a petition for modification and amendment of original order granting extension under 1933 act. *Irwin v. W.*, 195M362, 263NW153. See Dun. Dig. 6392.

Where an application to extend time for redemption from a mortgage foreclosure sale is entertained by the court, an order to show cause is granted for a hearing thereon, and application and order are served upon attorney for mortgagee, all before redemption period expires, it is a sufficient application and gives court jurisdiction to hear and determine matter. *Peters & Co. v. J.*, 195M497, 263NW453. See Dun. Dig. 6392.

Fact that application and order to show cause were not filed in office of clerk of court until after period of redemption had expired and that court rules as to filing of order were not strictly complied with did not deprive court of jurisdiction. *Id.*

Act does not require that trial court specifically fix a certain figure as value of property, and finding that mortgagor has a substantial equity is sufficient to sustain an extension, and order was not objectionable in failing to make finding as to reasonable rental value of apartment building, where mortgagor was required to apply all rental income upon maintenance and mortgage indebtedness. *Edeby v. P.*, 195M583, 264NW210. See Dun. Dig. 6392.

Where property is bid in by mortgagee, notice of an application to extend period of redemption may be served upon attorney who conducted mortgage foreclosure. *Rivkin v. N.*, 195M635, 263NW920. See Dun. Dig. 6392.

Notice of application for extension of period of redemption from mortgage foreclosure is not original process, and may be served as other notices are served in pending action or proceedings, and may be served by mail on attorney, where both attorney and mortgagee are non-residents and attorney's residence is known. *Id.*

Where attorney for mortgagee appoints a resident attorney upon whom mortgagor is directed to serve papers in proceedings, nothing to contrary being shown, presumption is that he had authority to make such appointment. *Id.*

Fact that application for extension of time to redeem, presented to court, and court's order thereon, fixing time for hearing and directing service of order as notice to mortgagee, were not filed with clerk of court until 3 days after order was made, did not deprive court of jurisdiction. *Id.*

The terms upon which an extension of time to redeem was to be granted were for the court to determine and fix; and it was not necessary to state in the prayer for relief in the application what such terms should be. *Id.*

Application for extension of period of redemption made within 30 days after March 15, 1935, gave court jurisdiction to hear and determine matter after time for redemption from mortgage sale had expired. *Bukowski v. T.*, 196M31, 264NW217. See Dun. Dig. 6392.

Court erred in granting extension of period of redemption where equity of mortgagor, if any, was very small and he had committed waste and had made no attempt to refinance and there was no showing that there was any prospect or hope that refinancing could be had. *Id.*

Court is required to render decision promptly in moratorium cases but a purchasing mortgagee should not have a favorable decision reversed because of court's delay. *Shepard v. M.*, 196M78, 264NW126. See Dun. Dig. 6392.

Second mortgagee making purchase at foreclosure sale could not object to order extending redemption requiring payment to be applied on first mortgage, there being a substantial equity in property and such payment tending to preserve rights of both parties. *Id.*

Net rental value of an apartment building for purpose of applying it as a condition to extending time of redemption cannot be placed at highest possible figure, in view of probability of more or less vacancies, and change in current rentals. *Id.*

Findings of value of property, sold on foreclosure of a second mortgage, and of its net rental value, in a proceeding for extension of time of redemption held sustained by evidence. *Id.*

Where a petition for extension of time within which to redeem is neither filed nor presented to court until after time for redemption has expired, court is without jurisdiction. *Steenland v. W.*, 196M106, 264NW440. See Dun. Dig. 6392.

Service of notice on holder of certificate of sale that application will be made to extend period of redemption will not toll period unless application or petition is filed or presented to court before expiration of year of redemption. *Id.*

Granting of extension of time to redeem is to some extent a matter of discretion for trial court. *Falk v. M.*, 196M341, 265NW60. See Dun. Dig. 6392.

If mortgagor gets an extension of time to redeem he is subject to rules of equity and required to substantially protect mortgagee from loss by reason thereof. *Id.*

Where mortgagor has no equity of any material value, no extension of time to redeem should ordinarily be granted, but where there is evidence that mortgagor has a substantial equity, that property has no present market value, so that mortgagee-purchaser could not, so far as appears, dispose of property so as to get its indebtedness presently paid therefrom, that payments required to be made by mortgagor are in excess of what mortgagee could realize as income from property if granted immediate possession, and extension of time granted is for a period of only 10 months, we cannot say that court exceeded its reasonable discretion in granting extension. *Id.*

In foreclosing a mortgage and in granting an extension under moratorium statute, federal court will follow state law as to substantive rights, but not statutes dealing with procedure. *Weisman v. M.*, 196M574, 265NW431. See Dun. Dig. 2350.

State courts cannot grant extension in foreclosure had in federal courts, but there is no reason why federal courts cannot grant relief, statute being in essence an enlargement of equity of redemption. *Id.* See Dun. Dig. 6392.

Section 9283 authorizes district court to set aside order extending time to redeem under §9633-5 and a subsequent order declaring a default by mortgagor of terms of extension order, where proceedings are had under a mistake of fact that mortgage foreclosure was valid, when foreclosure was void because of failure to file power of attorney to foreclose prior to mortgage foreclosure sale. *Orfield v. M.*, 199M466, 272NW260. See Dun. Dig. 6392.

Moratorium act is remedial in its purpose and is to be construed liberally to make its objectives realizable in its application to existing legal rights and remedies. It is duty of court, within limits of act, so to construe it as to avoid forfeitures. *Tomasko v. C.*, 200M69, 273NW628. See Dun. Dig. 6392.

As to a subsequent lien claimant who has duly placed himself in line of redemption, failure on part of mortgage debtor, in a moratorium proceeding instituted by him against certificate holder alone, to notify holder of such claim leaves such claimant free to act pursuant to statute which gives him right of redemption. *Id.*

It was proper to deny extension on ground that petitioner had no equity in mortgaged premises and that respondent would suffer irreparable loss if extension were granted. *Hoey v. F.*, 200M366, 274NW239. See Dun. Dig. 6392.

A petition for further extension comes in time if presented to court before expiration of period fixed, although hearing and decision thereon do not come until later. *Frissell Co. v. O.*, 204M398, 283NW756. See Dun. Dig. 6392.

Petition for a third extension of time wherein to redeem from a mortgage foreclosure properly denied for lack of showing that petitioners were without means, extraneous to the mortgaged property, wherewith to accomplish redemption. *Id.* See Dun. Dig. 6392.

9633-6. Court may revise and alter terms.—Under 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 such terms in such manner as the changed circumstances and conditions may require. (Act Apr. 18, 1933, c. 339, Pt. 1, §5; Mar. 15, 1935, c. 47, Pt. 1, §5; Feb. 13, 1937, c. 21, Pt. 1, §5; Feb. 4, 1939, c. 7, Pt. 1, §5.)

Mosse v. M., 193M496, 259NW19; note under §9633-5. Second extension was properly allowed where mortgagor had substantial equity in property and mortgagor was required to make payment in excess of income from property. *National Bank of Aitkin v. S.*, 195M273, 262NW689. See Dun. Dig. 6392.

Pending certiorari by mortgagors from order denying second extension of time to redeem from mortgage foreclosure, supreme court remanded case on motion by mortgagee on showing that condition had changed since hearing in district court and that mortgagors were in position to take care of the mortgage and redemption. *Sjodin v. O.*, 195M507, 263NW543. See Dun. Dig. 6392.

Court properly denied relief where mortgagor had no money with which to meet any payments on mortgage and no prospect of getting money therefor. *Aithoff v. B.*, 195M541, 263NW797. See Dun. Dig. 6392.

Court may vacate extension order and also order of default where foreclosure proceedings were invalid for failure to file power of attorney to foreclose. *Orfield v. M.*, 199M466, 272NW260. See Dun. Dig. 6392.

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 thirty 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 fifteen days after notice of such order, and such writ shall be returnable within thirty days after the filing of such order. (Act Apr. 18, 1933, c. 339, Pt. 1, §6; Mar. 15, 1935, c. 47, Pt. 1, §6; Feb. 13, 1937, c. 21, Pt. 1, §6; Feb. 4, 1939, c. 7, Pt. 1, §6.)

Butts v. T., 194M243, 260NW308; note under §9633-5. Entry of judgment instead of order extending time for redemption from mortgage foreclosure sale under the moratorium statute did not prevent a review by certiorari. *Swanson v. C.*, 192M81, 255NW812. See Dun. Dig. 1400.

Extension of time to redeem from a mortgage foreclosure sale is granted by an order and not by judgment, and review of such order is by certiorari. *Id.* See Dun. Dig. 6392, 6400.

Proceedings are summary and do not contemplate motions for a new trial, nor may an order denying a new trial be reviewed on certiorari issued prior thereto to review original decision. *Young v. P.*, 192M446, 256NW 906. See Dun. Dig. 7071.

Proceedings for extension of time within which to make redemption of property sold under mortgage foreclosure are summary and do not contemplate a motion for new trial. *Hjeltness v. J.*, 195M175, 262NW158. See Dun. Dig. 6392.

Certiorari to review an order granting or refusing a petition for an extension of time within which to redeem mortgaged premises sold at foreclosure sale must be had within 15 days after notice of such order. *Id.*

After year of redemption has expired in a foreclosure of a mortgage by advertisement, Moratorium Act cannot be invoked to extend time of redemption. *Campbell v. J.*, 195M376, 263NW94. See Dun. Dig. 6392.

During pendency of certiorari proceedings to review proceedings to extend time for redemption under mortgage foreclosure, plaintiff was required to either file a supersedeas bond or pay to clerk of district court monthly sums required by order as condition for extension. *Aylmer v. N.*, 195M661, 262NW257. See Dun. Dig. 6392.

9633-8. Inconsistent laws suspended till March 1, 1941.—Every law and all the provisions thereof now in force insofar as inconsistent with the provisions of this act, are hereby suspended until March 1, 1941. No extension of the period for redemption, nor any postponement of sale, shall be ordered or allowed un-

der this act which would have the effect of extending the period for redemption beyond March 1, 1941. (Act Apr. 18, 1933, c. 339, Pt. 1, §7; Mar. 15, 1935, c. 47, Pt. 1, §7; Feb. 13, 1937, c. 21, Pt. 1, §7; Feb. 4, 1939, c. 7, Pt. 1, §7.)

9633-9. Application of act.—This act as to mortgage foreclosures shall apply only to mortgages made prior to April 18, 1933, but shall not apply to mortgages made prior to April 18, 1933, 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, Pt. 1, §8; Mar. 15, 1935, c. 47, Pt. 1, §8 (1); Feb. 13, 1937, c. 21, Pt. 1, §8(1); Feb. 4, 1939, c. 7, Pt. 1, §8(1).)

9633-9a. Application of act.—The provisions of this act shall also apply to mortgage foreclosures wherein the District Court has previously postponed the sale or granted one or more extensions of the time for redemption, all pursuant to the provisions of Laws 1933, Chapter 339, Laws 1935, Chapter 47, and Laws 1937, Chapter 21; provided, that the period of redemption has not expired; and also shall apply to actions and proceedings now pending or hereafter commenced under said acts. (Act Mar. 15, 1935, c. 47, Pt. 1, §8(2); Feb. 13, 1937, c. 21, Pt. 1, §8(2); Feb. 4, 1939, c. 7, Pt. 1, §8(2).)

9633-10. Provisions severable.—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, Pt. 1, §9; Mar. 15, 1935, c. 47, Pt. 1, §9; Feb. 13, 1937, c. 21, Pt. 1, §9; Feb. 4, 1939, c. 7, Pt. 1, §9.)

9633-11. Definitions.—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; provided, however, the words "successors or assigns," when used in this act, shall be construed to include only persons who stand in privity of estate to the mortgagor. (Act Apr. 18, 1933, c. 339, Pt. 1, §11; Mar. 15, 1935, c. 47, Pt. 1, §10; Feb. 13, 1937, c. 21, Pt. 1, §10; Feb. 4, 1939, c. 7, Pt. 1, §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 hereof, the same shall be construed as having reference only to Part One of this act. (Act Apr. 18, 1933, c. 339, Pt. 1, §11; Mar. 15, 1935, c. 47, Pt. 1, §11; Feb. 13, 1937, c. 21, Pt. 1, §11; Feb. 4, 1939, c. 7, Pt. 1, §11.)

PART TWO

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; Mar. 15, 1935, c. 47, Pt. 2, §1; Feb. 13, 1937, c. 21, Pt. 2, §1; Feb. 4, 1939, c. 7, 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. Mortgagor 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; Mar. 15, 1935, c. 47, Pt. 2, §2; Feb. 13, 1937, c. 21, Pt. 2, §2; Feb. 4, 1939, c. 7, Pt. 2, §2.)

State courts cannot grant extension in foreclosure had in federal courts, but there is no reason why federal courts cannot grant relief, statute being in essence an enlargement of equity of redemption. Weisman v. M., 196M574, 265NW431. See Dun. Dig. 6392.

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; Mar. 15, 1935, c. 47, Pt. 2, §3; Feb. 13, 1937, c. 21, Pt. 2, §3; Feb. 4, 1939, c. 7, Pt. 2, §3.)

9633-16. Application of act.—The provisions hereof shall not apply to mortgages made after April 18, 1933, nor to mortgages made prior to April 18, 1933, 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; Mar. 15, 1935, c. 47, Pt. 2, §4; Feb. 13, 1937, c. 21, Pt. 2, §4; Feb. 4, 1939, c. 7, 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; Mar. 15, 1935, c. 47, Pt. 2, §5; Feb. 13, 1937, c. 21, Pt. 2, §5; Feb. 4, 1939, c. 7, 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 five days after trial or hearing, no more than five 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; Mar. 15, 1935, c. 47, Pt. 2, §6; Feb. 13, 1937, c. 21, Pt. 2, §6; Feb. 4, 1939, c. 7, 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; Mar. 15, 1935, c. 47, Pt. 2, §7; Feb. 13, 1937, c. 21, Pt. 2, §7; Feb. 4, 1939, c. 7, Pt. 2, §7.)

9633-20. Duration of act.—This Act shall remain in effect only during the continuance of the emergency and in no event beyond March 1, 1941. 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 March 1, 1941. (Act Apr. 18, 1933, c. 339, Pt. 2, §8; Mar. 15, 1935, c. 47, Pt. 2, §8; Feb. 13, 1937, c. 21, Pt. 2, §8; Feb. 4, 1939, c. 7, 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; Mar. 15, 1935, c. 47, Pt. 2, §9; Feb. 13, 1937, c. 21, Pt. 2, §9; Feb. 4, 1939, c. 7, Pt. 2, §9.)

BY ACTION

9634. By what rules governed.

1. Object of action.

Whether proceedings to foreclose mortgage be had by action or by advertisement, objects and ends sought are to enforce security, to have property applied to satisfaction of debt or other obligation secured thereby. *Fredin v. C.*, 285NW615. See Dun. Dig. 6303(60).

Is the mortgage only a power of sale under the lien theory of mortgages? 15MinnLawRev147.

3. A judicial proceeding.

A federal court, jurisdictional prerequisite present, has jurisdiction of an action to foreclose a mortgage on Minnesota land. *Weisman v. M.*, 196M574, 265NW431. See Dun. Dig. 6425a.

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.

In action to enjoin foreclosure of a real estate mortgage of \$1,500 on ground that plaintiff had received no more than \$400 from mortgagee, wherein defendant pleaded that he was a holder in due course of note and mortgage, and that plaintiff, because of payment of one installment of interest to such holder, was estopped from claiming that no more than \$400 was received, evidence held not to require a finding of estoppel. *Chamberlain v. T.*, 195M58, 261NW577. See Dun. Dig. 6236.

Mortgagor in mortgage for \$1,500 was entitled to enjoin foreclosure for more than \$400 she obtained from mortgagee, and assignee of mortgage took it subject to equities between original parties, even though a holder in due course of note. *Id.* See Dun. Dig. 6284.

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.*, 188M22, 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.*, 189M348, 249NW325.

Because certain tax certificates had been included, as to amount, in a judgment for mortgage debt and had thereby become merged, as to debt, they were discharged by settlement and satisfaction of judgment, and it was error to hold that such certificates held by third party for mortgagee evidenced a lien superior to plaintiff's mortgage. *Walton v. I.*, 200M337, 274NW239. See Dun. Dig. 6442.

3. Modification of judgment.

Where decree of mortgage foreclosure was granted, appointing a receiver of rents and profits, and mortgagee purchased land for full amount of mortgage indebtedness, a motion by defendant for an order requiring receiver to file his account and surrender the property during period of redemption was not objectionable as an attack upon the judgment, only directing court's attention to facts subsequently occurring. *Fredin v. C.*, 285NW615. See Dun. Dig. 6463.

9638. Purchase by mortgagee, etc.

When mortgagee purchased property at foreclosure sale, he took it not only subject to taxes and interest then past due, but subject to installments thereof which would become due thereafter, and a receiver appointed on foreclosure could not collect and apply rents and income upon mortgage or taxes. *Fredin v. C.*, 285NW615. See Dun. Dig. 6350.

9641. Report—Confirmation—Resale.

2. Resale.

180M173, 230NW780.

Curative acts

Apr. 5, 1939, c. 147, §2.

9642. Satisfaction of judgment—Execution for deficiency.

People's State Bank of Jordan v. R., 189M348, 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.*, 188M511, 247NW803. See Dun. Dig. 6484.

Mortgagee with deficiency judgment was entitled to bring an action at law upon assignment of lease and rents subject only to right of mortgagor, in an appropriate proceeding to collect any surplus over and above debt owned by defendant to plaintiff. *Prudential Ins. Co. v. A.*, 196M154, 264NW576. 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. M.*, 188M346, 247NW241. See Dun. Dig. 6423.

Where parties concerned with application for an order extending period for redemption from mortgage foreclosure made a settlement in regard to extension by

agreeing that period of redemption should be extended to a certain date and that petitioner should have right to receive and retain rents from that date and receive a certain sum for a mechanical stoker, the agreement was a binding settlement of the litigation, notwithstanding terms had not been incorporated in a written stipulation or memorial of the completed settlement, and the agreement was not vitiated under the statute of frauds or otherwise by reason of inclusion of transfer of personal property or fixtures. State v. District Court, 194M 32, 259NW542. See Dun. Dig. 6392.

As the fee does not pass from mortgagor to purchaser at foreclosure sale until expiration of year for redemption, a mortgagee, like any other purchaser, became entitled only to rights and subject to such conditions as are fixed by law for redemption of property, and having bid in property for full amount of mortgage debt was not entitled to have rents and profits apply on subsequent installments of taxes or interest. *Fredin v. C.*, 285NW615. See Dun. Dig. 6369.

County which has obtained judgment against surety of county depository may redeem land of such surety sold under mortgage foreclosure. Op. Atty. Gen. (412a-10), July 5, 1934.

County redeeming from mortgage foreclosure as judgment creditor of the mortgagor does not thereby extinguish the debt, except to the extent of the value of the property so redeemed less the amount he pays in redemption. *Id.*

9645. Strict foreclosure.

Strict foreclosure. 23MinnLawRev388.

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.

Bidding at a foreclosure sale is not practice of law, and so function may properly be delegated to one not an attorney at law. *Klotz v. J.*, 201M355, 276NW244. See Dun. Dig. 664.

9648. Purchaser at foreclosure, execution or judicial sale 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.*, 183M349, 247NW239. See Dun. Dig. 6260.

Record of affidavits filed was competent proof of taxes and insurance paid subsequent to foreclosure sale by holder of sheriff's certificate. *Young v. F.*, 192M446, 256NW306. See Dun. Dig. 6485.

Evidence held conclusive that mortgagee bank had no contract under which money deposited by mortgagor in bank could be appropriated to payment of unpaid delinquent taxes after defendant bid in mortgaged premises for full amount of debt. *Business Women's Holding Co. v. F.*, 194M171, 259NW812. See Dun. Dig. 6368.

A covenant in a real estate mortgage to pay taxes levied during life of mortgage does not survive foreclosure of mortgage where mortgaged premises are bid in for full amount of debt and expenses and there is no redemption, and purchaser takes subject to unpaid taxes, and remedy, if he pays same during year of redemption, is to file an affidavit, whereby amount paid is added to amount required to redeem. *Id.* See Dun. Dig. 6368.

A covenant in a real estate mortgage to pay taxes levied during life of mortgage does not survive foreclosure of mortgage where mortgaged premises are bid in for full amount of debt and expenses and there is no redemption, and purchaser takes subject to unpaid taxes, and remedy, if he pays same during year of redemption, is to file an affidavit, whereby amount paid is added to amount required to redeem. *Id.* See Dun. Dig. 6202.

Purchaser at a foreclosure sale may pay taxes against foreclosed premises and have an additional lien thereon to be tacked to amount of his sheriff's certificate and include in amount required to make a redemption on part of a subsequent lienholder, but it is mandatory that he file statutory affidavit and failure so to do precludes certificate holder from claiming payment of such additional amount as against a subsequent lien claimant redemptioner. *Tomasko v. C.*, 200M69, 273NW628. See Dun. Dig. 6202, 6416, 9255, 9257.

As to a subsequent lien claimant who has duly placed himself in line of redemption, failure on part of mortgage debtor, in a moratorium proceeding instituted by him against certificate holder alone, to notify holder of such claim leaves such claimant free to act pursuant to

statute which gives him right of redemption. *Id.* See Dun. Dig. 6392.

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 at 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.*, 182M 450, 234NW636. See Dun. Dig. 6344a.

Application of doctrine of marshaling assets. 23Minn LawRev692.

9650. Court to appoint receiver of rents.

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, 214NW52.

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

A receiver should not be appointed to collect rents and profits and apply them on delinquent taxes or interest, 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.

Evidence held to show such conduct on part of an insolvent mortgagor and its general receiver as to warrant an order requiring such receiver to segregate and hold separate all rents collected from mortgaged premises during foreclosure and period of redemption and to apply same to making of necessary repairs and to payment of taxes and insurance in order to save waste to mortgaged premises. Failure to pay taxes is a species of waste. *Brodala v. S.*, 191M97, 253NW113. See Dun. Dig. 6459.

Proof of inadequacy of security caused by nonpayment of taxes accruing after execution of mortgage and insolvency of mortgagors, justified appointment of a receiver to collect rents for application upon unpaid taxes. *Minneapolis Sav. & Loan Ass'n v. Y.*, 193M632, 259NW382. See Dun. Dig. 6459.

In refusing to continue to later date hearing on order to show cause why a receiver should not be appointed to collect rents on mortgaged property, and in allowing an amendment to complaint, court did not abuse its discretion. *Id.* See Dun. Dig. 6459.

Where findings of fact, based on affidavits made on behalf of plaintiff, amply justify appointment of a receiver pending foreclosure proceedings, appellate court cannot disturb action of trial court, in absence of a showing that it acted arbitrarily or without reasonable cause. *Lincoln Nat. Life Ins. Co. v. B.*, 196M433, 266NW 290. See Dun. Dig. 410, 6460.

Mortgagee purchasing at foreclosure sale for less than debt plus interest and costs of foreclosure, subject to unpaid taxes which were a paramount lien, was not entitled to appointment of a receiver to collect and apply rents either upon unpaid taxes or mortgage debt remaining unpaid. *House v. A.*, 197M283, 266NW739. See Dun. Dig. 6460.

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*, 189M412, 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*, 189M412, 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.)

9655-5. Powers and duties of trustees in certain cases.—Whenever a mortgage made or assigned to a trustee or trust deed on any real property or any real and personal property located in this State has been heretofore or shall hereafter be foreclosed and bid in on such foreclosure by a trustee for the holders of the bonds or notes secured by such mortgage or trust deed, or for the holders of certificates or other evidences of equitable interest, in such mortgage or trust deed, or whenever a mortgagor after the mortgage has been executed and delivered, but not before nor as a part of the mortgage transaction, conveys directly to the mortgage trustee, thereby eliminating his title, the said trustee may at any time petition the district court of the county in which such property or any portion thereof is situated for instructions in the administration of the trust. Upon the filing of such petition the court shall make an order fixing

a time and place for hearing thereof, unless hearing has been waived in writing by the beneficiaries of such trust. Notice of such hearing shall be given by publishing a copy of such order one time in a legal newspaper of such county at least twenty days before the date of such hearing, and by mailing a copy thereof to each known party in interest then in being whose address is known, at his last known address, at least ten days before the date of such hearing or in such other manner as the court shall order, and if such court shall deem further notice necessary it shall be given in such manner as may be specified in such order. Upon such hearing the court shall make such order as it deems appropriate, including an order to sell, mortgage, or lease such property or any part thereof in such manner and upon such terms as the court may prescribe. In the case of a sale, the court in its discretion may authorize the trustee to sell at private sale or may direct the sheriff of said county to offer such property for sale at public auction and sell the same to the highest bidder therefor for cash. Any sale of such property made at public auction shall be reported to the court for confirmation and confirmed by the court before the same shall become effective and valid. Notice of hearing on such confirmation shall be given to all parties in interest who have appeared in said proceedings. Upon such confirmation, the sheriff shall make, execute and deliver, subject to such terms and conditions as the court in its order of confirmation may impose, a good and sufficient instrument or instruments of conveyance, assignment and transfer. No confirmation of a private sale, mortgage or lease shall be required. The order of confirmation in the case of a sale at public auction, and the order authorizing a private sale, mortgage or lease, shall be final and conclusive as to all matters thereby determined, and shall be binding in rem upon the trust estate and upon the interests of all beneficiaries, vested or contingent, except that appeal to the Supreme Court may be taken from such order by any party in interest within thirty days from the entry thereof, by filing notice of appeal with the clerk of district court, who shall mail a copy of such notice to each adverse party who has appeared of record. (Mar. 25, 1937, c. 108, §1.)

9655-6. Limitation of Act.—Nothing in this act contained shall be deemed to limit or abridge the power or jurisdiction of the district court over trusts and trustees, or to limit the authority conferred upon any trustee by any mortgage, trust deed, or other instrument. (Mar. 25, 1937, c. 108, §2.)

9655-7. Proceedings legalized.—All actions and proceedings heretofore brought or commenced in which the procedure prescribed by this act has been followed are hereby legalized and validated and any orders made therein shall have the same force and effect as if made hereunder. (Mar. 25, 1937, c. 108, §3.)

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.*, 182M225, 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. *Fowle v. F.*, 184M82, 237NW846. See Dun. Dig. 14.

2. Held not to survive.

Rights of parent to support under deed to child are personal and do not survive. *Gamble v. M.*, 187M640, 246NW368; *Mallckl v. M.*, 189M121, 248NW723. See Dun. Dig. 2677.

Action and cause of action for malicious prosecution and false arrest ended as to a certain defendant with his death. *Hoffer v. F.*, 204M612, 244NW873. See Dun. Dig. 14.

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.